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In The

Supreme Court of the United States

BERNARD PARKS,

Petitioner,

v.

DAVID DIAZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROCKARD J. DELGADILLO,
City Attorney
JANET G. BOGIGIAN,
Assistant City Attorney
Counsel of Record
900 City Hall East
200 N. Main Street
Los Angeles, California 90012
(213) 978-7997

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. To establish standing under RICO, a plaintiff must show he was "injured in his business or property." (18 U.S.C. § 1964(c).) Is that standing requirement met by a plaintiff who pleads a noncompensable personal injury, such as false imprisonment, but claims that as part of that personal injury, he suffered secondary pecuniary consequences, such as his inability to pursue employment prospects while incarcerated?

2. In determining whether a RICO plaintiff has alleged an injury to a business or property interest under 18 U.S.C. § 1964(c), should federal courts rely exclusively on state law or should RICO's intent and the need for uniform application of civil RICO be overrriding considerations?

3. Must a plaintiff suffer a concrete financial loss and injury to a tangible property interest to meet RICO's "injured in his business or property" standing requirement (18 U.S.C. § 1964(c)) or is it sufficient to allege he lost an expectancy interest or opportunity for financial gain?

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OPINIONS BELOW

The unanimous decision of the United States Court of Appeals for the Ninth Circuit was initially filed January 20, 2004 and is reproduced in the attached Appendix at pages 51-56. Plaintiff/Appellant's petition for panel rehearing and rehearing en banc was filed February 3, 2004. The Ninth Circuit filed an amended opinion on August 23, 2004, with one judge now dissenting. In that opinion, the court ordered that no subsequent petitions for rehearing and petitions for rehearing en banc be filed in response to the amended opinion. App. 37-50. Rehearing en banc was granted November 18, 2004. App. 117-118. The 7-to-4 en banc per curiam decision of the United States Court of Appeals for the Ninth Circuit, filed August 16, 2005, is reported at 420 F.3d 897 (9th Cir. 2005). App. 1-36.

JURISDICTION

The order granting rehearing en banc was filed November 18, 2004. App. 117-118. The en banc opinion of the Court of Appeals was entered August 16, 2005. App. 1. This Petition for Writ of Certiorari is timely filed within 90 days of that date in accordance with Rule 13.3 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant sections of the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. §§ 1961, 1962, and 1964, are printed in the Appendix at pages 119-125.

STATEMENT OF THE CASE

A. Diaz's conviction for attempted murder has withstood review through the California appellate courts and the United States District Court

On a summer night in 1998 on the streets of Los Angeles, David Diaz pulled out a handgun and shot numerous times at a rival gang member. The victim "was hit twice in the leg, the bullets destroying the femoral artery of his lower leg and shattering his fibula." *People v. Diaz*, 95 Cal.App.4th 695, 698. (Cal. 2002). App. 63.

Convicted by a jury, Diaz was sentenced to 37 years to life for attempted murder, aggravated mayhem, assault by means likely to produce great bodily injury, and assault with a semiautomatic weapon, with enhancements for discharging a firearm causing great bodily injury, firearm use, and infliction of great bodily injury. *People v. Diaz*, 95 Cal.App.4th at 697-698. App. 62.

Diaz's conviction was affirmed by the California Court of Appeal in January 2002. *People v. Diaz*, 95 Cal.App. 4th 695. App. 79.

Diaz's Petition for Rehearing in the California Court of Appeal and for Review in the California Supreme Court were denied. (S104896.) App. 23, n. 1. So too was his

Petition for Certiorari in the United States Supreme Court. (02-5297). App. 23, n. 1.

His Petition for Writ of Habeas Corpus filed in the U.S. District Court, Central District of California, was denied on May 27, 2005. In the order denying habeas, the District Court judge stated, "Petitioner does not contest the sufficiency of the evidence to support his conviction." App. 23, n. 1.

Diaz's appeal from denial of the habeas is pending in the U.S. Court of Appeals for the Ninth Circuit. (05-56257).

B. Nevertheless, Diaz filed a civil RICO suit claiming his false arrest and conviction caused him to suffer diminished employment opportunities and prospects

In July 2001 – three years after his arrest – Diaz filed a civil lawsuit under RICO, 18 U.S.C. § 1961 *et seq.*, in which he named some 238 defendants, including dozens of Los Angeles City officials and employees and dozens of LAPD officers. Ultimately, only former Los Angeles Police Department Chief Bernard Parks was served and he is the only defendant in this suit.

Diaz's complaint alleged that:

> "[¶] 16. On or about July 14, 1998, defendants Armando Rodriguez, Juan Parga, and Jose Ramirez fabricated evidence to the effect that plaintiff had committed assault with a deadly weapon, they tampered with witnesses and conspired to obtain the false conviction of plaintiff. Thereafter these LAPD officers fabricated further such evidence along with defendant William Eagleson to

> cause the false conviction of plaintiff, and all of them caused this kidnapping of plaintiff." Complaint 13-14.

The complaint also alleged "LAPD, its CRASH Unit, and its Rampart Division" were all "enterprises within the meaning of 18 U.S.C. 1961(4)" and that defendants had "acquired and/or maintained control over said enterprises through a pattern of racketeering activities. . . ." in violation of 18 U.S.C. § 1962(b). Complaint 15, ¶ 26. The complaint further alleged "Defendants, being associated with said enterprises, conducted and/or participated in said enterprises' affairs through a pattern of racketeering activities, in violation of 18 U.S.C. 1962(c)." Complaint 15, ¶ 27.

As for his injuries, Diaz alleged that "as a result of" his false conviction and unlawful incarceration, he was "deprived of his ability to earn a living and [he] has suffered economic harm." Complaint 14, ¶ 17. He also pleaded:

> "[¶] 31. [P]laintiff lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated.
>
> "[¶] 32. Plaintiff has suffered a material diminishment of his employment prospects by virtue of the unjust and unconstitutional convictions he has sustained." Complaint 16.

The complaint contained no allegation that Diaz was employed at the time of his arrest nor did the complaint

identify what employment "prospects" had become "diminished."

C. The motion to dismiss on the pleadings

Petitioner Bernard Parks moved for dismissal on the pleadings on the grounds that "[p]laintiff has failed to plead several necessary elements of a RICO claim" including that Diaz had not sufficiently alleged that he had become "injured in his business or property" as required by 18 U.S.C. § 1964(c). App. 3, 81.

The district court granted the motion, dismissed the case without prejudice, and permitted Diaz time to amend his complaint. App. 81. Diaz declined to amend and ultimately the case was dismissed with prejudice. App. 3.

In granting the motion, the district court focused on whether Diaz had sufficiently met the "injured in his business or property" requirement of 18 U.S.C. § 1964(c). The court noted that false arrest and imprisonment are personal injuries, citing *Owens v. Okure*, 488 U.S. 235, 251 (1989) and *Wilson v. Garcia*, 471 U.S. 261, 277 (1985). App. 86-87. Relying on *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783 (9th Cir. 1992), *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992), and *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988), the district court concluded "that the terms 'business and property' are words of limitation which preclude recovery for personal injuries and any consequential pecuniary losses." App. 87. "That Plaintiff suffered some secondary financial losses flowing from his personal injuries does not transform his losses into injuries to business or property." App. 87.

When examining strictly the nature of the damages, the court looked to California law and determined that loss of employment generally is not a property injury. App. 89. Citing *Grogan*, 835 F.2d at 848, and *Oscar*, 965 F.2d at 785, the court also found "[p]laintiff's claimed 'employment opportunity' losses" could not "be characterized as the kind of tangible financial loss to a business recoverable under RICO." App. 90.

The court also found the complaint did not adequately allege a substantive violation of any of 18 U.S.C. section 1962's four subsections. Having addressed this issue at length previously in other similar lawsuits, the court incorporated its order in *Serrano v. City of Los Angeles* into its order in this case. App. 90, 91-116.

D. Proceedings in the Ninth Circuit

1. The first unanimous *Diaz* decision affirming the dismissal

In an unanimous three-judge panel decision filed January 20, 2004, the Ninth Circuit affirmed the defense judgment noting that "not all injuries are compensable under RICO" (App. 54), and "[t]his and other courts have consistently held that personal injuries are not recoverable under RICO." App. 55.

In particular, the court relied heavily on *Grogan v. Platt*, which had been "cited with approval in both the *Oscar* majority and dissent." App. 55. *Grogan*, 835 F.2d at 847, "specifically rejected the notion that the pecuniary and nonpecuniary aspects of personal injury claims may be separated for purposes of RICO; rather the court noted that economic consequences and personal injuries are often intertwined and therefore concluded that 'pecuniary

losses are so fundamentally a part of personal injuries that they should be considered something other than injury to "business or property."'" App. 59.

Citing *Oscar*, 965 F.2d at 785, for the proposition that the showing of injury "requires proof of concrete financial loss, not 'mere injury to a valuable intangible property interest,'" the court also found there was no allegation of out-of-pocket expenses resulting from the police's alleged wrongful acts in that Diaz merely alleged that he was "rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." App. 58. The court saw this as nothing more than an injury to "a valuable intangible property interest in his right to pursue employment." App. 58.

Finally, even if the right to pursue a profession was a property right under California law, the court found "such injury is insufficient to satisfy RICO's standing requirement" and agreed with the Seventh Circuit in *Doe*, 958 F.2d at 768, that the court should not "'adopt an interpretation of property that will contravene Congress' intent in enacting RICO.'" App. 59.

2. The amended opinion affirming, but with a dissent

Two weeks after the original opinion was filed, Diaz filed a petition for panel rehearing and rehearing en banc. In August 2004 – seven months after the original opinion issued – Diaz's petition remained pending but the court issued an amended opinion. One judge now dissented. App. 37-50.

The majority again found Diaz lacking standing to bring a RICO claim for failing to allege an injury to business or property. He "has not alleged that he lost actual employment, only that he was 'rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated.'" App. 43-44. Diaz alleged no more than "the consequential damages of being deprived of his right 'to pursue gainful employment.'" And, there was no allegation of out-of-pocket expenses resulting from wrongful conduct by the police. App. 44.

The dissent now concluded Diaz had sufficiently alleged "lost employment" as a direct financial loss and an injury to business or property. App. 48, 50.

In its amended opinion, the court ordered that "[n]o subsequent petitions for rehearing and petitions for rehearing en banc may be filed in response to the amended opinion." App. 38.

3. The 7-to-4 en banc opinion

On November 18, 2004, rehearing en banc was granted. App. 117-118. The en banc per curiam opinion was filed August 16, 2005. App. 1.

On a 7-to-4 vote, the en banc majority per curiam opinion reversed the district court, finding Diaz had sufficiently alleged a property interest and financial loss. Drawing from state tort law, the court ruled that the "harms [Diaz] alleges amount to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law." App. 7.

Diaz's financial loss, the court said, was that "[h]e could not fulfill his employment contract or pursue valuable employment opportunities because he was in jail." App. 8.

The dissent disagreed with the majority opinion which it saw creating a clear split with the Seventh Circuit in *Doe v. Roe*, 958 F.2d 763, and the Eleventh Circuit in *Grogan v. Platt*, 835 F.2d 844:

> "I would simply follow the Seventh and Eleventh Circuits by holding that Diaz's claim of employment loss was derived from, and a secondary effect of, his alleged false imprisonment, and any economic losses are part of Diaz's injury to his person, not distinct injuries to his business or property within the meaning of RICO." App. 31-32.

Drawing from *Doe*, the dissent reasoned,

> "Diaz allegedly missed work because he was falsely incarcerated, while Doe allegedly missed work due to the continuous threats and harassment of her former divorce attorney. Both plaintiffs alleged injury to business or property wholly derived from personal injuries (false imprisonment and emotional distress, respectively)." App. 33.

The dissent also noted RICO's standing requirement "includes a causation requirement" which mandates there be a "direct relation between the injury asserted and the injurious conduct alleged." The dissent believed that the majority opinion – having found the injury was sufficiently pled – should have addressed this second part of the standing inquiry. App. 36.

The dissent observed that even assuming sufficient injury was alleged, there were "a series of intervening causes independent of LAPD Chief Parks" including "the prosecutor who decided if, when, and how to prosecute Diaz; the state trial judge who presided over the case; the jury who convicted Diaz; and the state courts of appeal that have subsequently affirmed his conviction." App. 36.

REASONS FOR GRANTING THE WRIT

A. Summary

David Diaz is serving 37-years-to-life for a conviction for attempted murder and other felony charges. That conviction remains valid, having withstood state appellate and federal court scrutiny. App. 23 (n. 1), 67. As such, *Heck v. Humphrey,* 512 U.S. 477 (1994) barred any 42 U.S.C. § 1983 civil rights claim he may have had to challenge the arrest and conviction. So Diaz set his sights on RICO with its generous statute of limitations, treble damages, and attorney's fees.

The Ninth Circuit obliged. In its divided en banc opinion, the majority permits Diaz to proceed with a RICO suit against the former police chief of the Los Angeles Police Department on the theory that Diaz adequately met RICO's standing requirement – that he was "injured in his business or property" (18 U.S.C. § 1964(c)) – by allegations that he "was rendered unable to pursue gainful employment" while defending the charges and imprisoned and that he "suffered a material diminishment of his employment prospects by virtue of the unjust and unconstitutional convictions he has sustained." Complaint 16, ¶¶ 31, 32; App. 44, 53.

At least three other circuits have rejected RICO standing under comparable circumstances, finding that where the alleged core injury is a personal injury, the injury to business or property requirement is not satisfied by an allegation that the plaintiff suffered some secondary, derivative pecuniary loss as a result of the personal injury. *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988); *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992); and *Drake v. B.F. Goodrich, Co.*, 782 F.2d 638 (6th Cir. 1986).

Here, Diaz's core injury is a personal injury – false arrest and imprisonment. (See *Owens v. Okure*, 488 U.S. 235, 240-241 (1989).)[1] That core personal injury claim is not transformed into an injury to his business or property for RICO standing purposes by his speculative allegation that had he not been arrested, imprisoned, and convicted, he might have found employment.

Moreover, the majority's finding that an allegation of a possible financial loss from unidentified employment "opportunities" and "prospects" satisfies RICO's standing requirement is also a direct affront to the Ninth Circuit's previous en banc decision in *Oscar*, 965 F.2d at 785, which requires a *concrete* financial loss and an injury to a *tangible* property interest and not to a mere expectancy interest. These requirements have been adopted by at least three other circuits. *In re Municipal Taxable Bonds Securities Litigation*, 51 F.3d 518 (5th Cir. 1995); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998); *Regions*

[1] False arrest and imprisonment are not, of course, predicate acts under 18 U.S.C. § 1961(1) (App. 119-121), but the Ninth Circuit appeared to adopt Diaz's characterization of his arrest as a kidnapping.

Bank v. J.R. Oil Co., LLC., 387 F.3d 721, 729-730 (8th Cir. 2004); *Maio v. Aetna*, 221 F.3d 472, 483-484 (3d Cir. 2000).

As Judge Reinhardt concedes in his *Diaz* concurrence, the majority's read of RICO takes the statute far afield of the anti-racketeering statute it set out to be. App. 13. Although he indicates his personal disagreement with such a lax read of RICO, he argues the Ninth Circuit had no choice here because the Supreme Court has given RICO such a broad construction. App. 13.

Hardly. The *Diaz* majority is at odds with the Supreme Court's mandate that "injured in his business or property" is to be given "restrictive significance" (see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)) and that RICO, while to be read broadly, must be read consistently with its intent and purpose.

The *Diaz* majority also suggests it is doing nothing more than following Supreme Court guidance in looking to state law to determine what constitutes a property right for RICO standing purposes. Relying on the California torts of intentional interference with contract and interference with prospective business relations, the majority concludes Diaz has identified a property interest. But the majority has paid no heed to the Supreme Court's guideline that property involves something more than expectancy rights. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Moreover, while some circuits have suggested state law as a source for defining property for RICO purposes, they have consistently warned such definitions do not automatically control. RICO's intent and uniform application of RICO remain overriding concerns. *Doe v. Roe*, 958 F.2d at 768 (7th Cir. 1992); *DeMauro v. DeMauro*, 115 F.3d

94, 96-97 (1st Cir. 1997); *Price v. Pinnacle Brands, Inc.*, 138 F.3d at 607 (5th Cir. 1998). *Diaz* has failed to heed any of these warnings.

B. *Diaz's* finding that possible pecuniary losses secondary to a personal injury satisfy RICO's injury to business or property standing requirement creates a rift within the Ninth Circuit, with other circuits, with district courts, and with the Supreme Court

1. The divide within the Ninth Circuit

> A RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima v. S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496. (1985).

The reach of civil RICO's injury-to-business-or-property standing requirement (18 U.S.C. § 1964(c)) (App. 125) has been a source of tremendous confusion and conflict for litigants, for the district courts, and for the appellate courts.

At the appellate level, there is perhaps no better illustration of this than the very history of this case which, as set forth above, has led the Ninth Circuit to issue three substantially different opinions: a unanimous three-judge decision, an amended decision with one judge now dissenting, and, finally, a divided 7-to-4 en banc decision from 11 judges, none of whom participated in the original and amended three-judge decisions. App. 1-36, 37-50, 51-61.

Thus, the 14 Ninth Circuit judges who have spoken over the course of the three opinions issued in this case have been unable to reach a consensus. And, the en banc

majority's opinion is directly at odds with a previous Ninth Circuit en banc opinion addressing RICO standing issues, *Oscar v. University Students Co-Operative Ass'n,* 965 F.2d 783 (9th Cir. 1992) (en banc).

In *Oscar*, a divided en banc panel rejected the RICO claim of a tenant who sought RICO relief because nearby drug dealers were causing her quality of life problems. The injury asserted, the court reasoned, was not to her property but was her "personal discomfort and annoyance" caused by defendant's nuisance activities. The court found this to be a "personal injury action" not actionable under RICO. 965 F.2d at 787-788.

> "It is clear . . . that any injury she has suffered is at its core an intangible personal injury, not a financial loss to property. Oscar can recover for such injuries under any of a myriad of state law causes of action. She cannot do so under RICO, however." 965 F.2d at 787.

But the *Diaz* majority had no qualms departing from *Oscar* to sanction a RICO claim which too is "at its core" a "personal injury" – false arrest and imprisonment[2] – with speculative economic damages secondary to the personal injury.

Also waiting in the wings in the Ninth Circuit is *Guerrero v. Gates,* 357 F.3d 911, 920 (9th Cir. 2004) in which the plaintiff also sought to remedy loss of employment opportunities stemming from an alleged wrongful

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[2] See *Owens v. Okure,* 488 U.S. at 240-241, finding 42 U.S.C. § 1983 claims based on false arrest and imprisonment are "best characterized as personal injuries actions" and thus subject to personal injury statute of limitations.

incarceration. *Guerrero* relied on *Oscar* and the original *Diaz* opinion in concluding, "We have long held that RICO was not crafted to address claims of personal injury." The court also found that the claimed injuries were no more than injury to a valuable intangible property interest. 367 F.3d at 920. The Ninth Circuit has stayed ruling on the *Guerrero* petition for en banc review pending final review of *Diaz*.

As the conflicts within the Ninth Circuit alone illustrate, guidance is urgently needed on the questions presented. But – as noted immediately below – the conflicts created by en banc opinion reach well beyond the Ninth Circuit.

2. The split with other circuits

As the four dissenting judges note in *Diaz*, the majority opinion creates a split with the Eleventh Circuit in *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988), and the Seventh Circuit in *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992), "both of which held that pecuniary losses incurred as a result of personal injuries were non-compensable under RICO." App. 33-34.

Judge Kleinfeld, concurring, joined by Judges Reinhardt and Berzon, concedes his approach in *Diaz* takes the court down a path that collides with that traversed by other circuits: "[I] part ways from *Grogan* and *Doe*. . . ." App. 15-16.

Thus, 7 of the 11 members of the en banc panel openly acknowledge that this en banc opinion conflicts with opinions from two other circuits. In addition, as set forth below, the opinion is also in conflict with the Sixth Circuit

in *Drake v. B. F. Goodrich Co.*, 782 F.2d 638 (6th Cir. 1986.)

a. Eleventh Circuit: *Grogan v. Platt*

Oscar, 965 F.2d at 786, relied in part on *Grogan* which considered the issue at hand here and found that loss of employment that derives from a personal injury – there assault and battery and wrongful death of FBI agents – does not satisfy RICO's injury to business or property standing requirement. The court found the losses that Grogan alleged were "pecuniary losses that are most properly understood as part of a personal injury claim." 835 F.2d at 848. *Grogan* noted that if Congress intended that such economic losses that result from personal injury be recoverable as treble damages under civil RICO, it would not have used the restrictive "business or property" language in section 1964(c). *Grogan*, 835 F.2d at 847.

The *Diaz* majority argues it is possible its opinion does not conflict with *Grogan*. App. 10, n. 2. But *Grogan's* finding that plaintiffs' *actual* loss of wages which are derivative of a personal injury claim (assault, battery and murder) do not satisfy RICO standing is irreconcilable with *Diaz's* finding that standing is satisfied by an allegation that the plaintiff suffered a "material diminishment of employment opportunities" and an inability "to pursue gainful employment" which are derivative of a personal injury claim (false arrest and imprisonment).

The *Diaz* majority downplays the conflict by reasoning it chose to look to state law for a definition of property, and then speculates that "[i]t is entirely possible that the plaintiffs in *Grogan*, unlike Diaz, failed to allege a right to employment that was recognized as property under state

law." The majority adds, "[r]eading *Grogan*, we know nothing about how Florida law treated the right to earn wages at the time Grogan brought his lawsuit, nor whether he claimed that his loss amounted to a property interest." App. 10-11.

But, as the *Diaz* dissent notes, the same is surely true here:

> "We have no clue from Diaz's complaint what 'employment' Diaz has alleged to have lost, if any, while he was 'unjustly' incarcerated, and whether that employment would be considered property or business under California law, or not." App. 34.

Rather, the dissent urges, "[t]he majority should concede that FBI employment [in *Grogan*] would qualify as state-protected property interest under its own test, and this undermines the majority's argument, resting on the incorrect promise that in *Grogan* no valid state property right was alleged, involved, or evoked." App. 34.

b. Seventh Circuit: *Doe v. Roe*

The *Diaz* majority is also directly at odds with the Seventh Circuit in *Doe v. Roe*, 958 F.2d 763. Doe brought a RICO claim against her former divorce attorney with whom she had sexual relationships as partial payment for her bills. The court considered her several theories of injury to business or property under 18 U.S.C. § 1964(c). Those included that the divorce lawyer's harassment and intimidation caused her to miss work, buy a security system, and hire a new divorce lawyer.

The court began by noting "[t]he terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom." 958 F.2d at 767, citation omitted. Finding Doe's allegations did not meet the injury to business or property requirement, the court found:

> "Doe's loss of earnings, her purchase of a new security system and her employment of a new attorney are plainly derivative of her emotional distress – and therefore reflect personal injuries which are not compensative under RICO." 958 F.2d. at 770 (citing *Grogan*, 958 F.2d at 847.)

Just as in *Grogan*, *Doe* did not focus solely on whether there was an quantifiable financial loss. "Whether she can show a financial loss does not, by definition, establish that she suffered a business or property injury within the meaning of § 1964(c)." 958 F.2d at 770.

Rather, citing *Grogan*, *Doe* adopted the Seventh Circuit's analytical approach, looking to the nature of the injury that led to that financial loss. In both *Grogan* and *Doe*, any injuries to business or property were found to be derivative of personal injuries which are not compensable under RICO.

The *Diaz* majority also denies it bumps heads with the Seventh Circuit in *Doe*, but again the collision is undeniable. As the *Diaz* dissent aptly describes it,

> "[I]n *Doe*, the Seventh Circuit addressed the same situation we face here – an allegation of lost employment wages stemming from a non-compensable personal injury. Diaz allegedly missed work because he was falsely incarcerated, while Doe allegedly missed work due to the continuous

threats and harassment of her former divorce attorney. Both plaintiffs alleged injury to business or property wholly derived from personal injuries (false imprisonment and emotional distress, respectively)." App. 33.

c. Sixth Circuit: *Drake v. B. F. Goodrich Co.*

Consistent with *Grogan* and *Doe*, the Sixth Circuit in *Drake v. B.F. Goodrich Co.*, 782 F.2d 638 (6th Cir. 1986), denied plaintiffs' use of RICO finding "the injuries complained of are not within the ambit of the statute." 782 F.2d at 644. Plaintiffs sought compensation for personal injuries and wrongful death arising from toxic exposure in the workplace. The Sixth Circuit rejected "plaintiffs' broad interpretation of the RICO statute" that "anyone suffering pecuniary injury as a direct result of a violation of RICO's substantive provisions" can bring a RICO claim. 782 F.2d at 644.

Drake noted the Supreme Court's position in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) that "[t]he phrase 'injury to business or property' also retains a restrictive significance. It would, for example, exclude personal injuries suffered." 782 F.2d at 644.

3. The split with district courts

District courts have also struggled to resolve this RICO standing issue, and have done so adversely to the *Diaz* majority.

In *Burnett v. Al Baraka Investment and Development Corp.*, 274 F. Supp.2d 86 (D.D.C. 2003), the court considered many claims, including RICO, brought by victims of

the September 11 terrorist attacks. Plaintiffs sought the "economic losses derived" from the victims' personal injuries. Rejecting the RICO claims, the court relied heavily upon *Grogan* and *Doe* finding pecuniary losses that flow from personal injuries do not satisfy the "business or property" RICO injury requirement. 274 F.Supp. 2d at 101-102.

The district court also predicted that "when the District of Columbia Circuit Court of Appeals gets around to addressing this issue squarely, its decision will be the same as that of its sister courts." 274 F. Supp.2d at 102.

In *Gaines v. Texas Tech University*, 965 F. Supp. 886 (N.D. Tex. 1997), the court considered whether a football player derailed by a knee injury had met RICO's injury to business or property requirement by his allegations of "pecuniary losses resulting from his knee injury, including loss of an NFL contract with the Patriots and medical expenses" and "loss of an educational opportunity." 965 F. Supp. at 890.

Again engaging in an analysis reminiscent of *Grogan* and *Doe*, the court found the loss of a football contract and medical expenses were "pecuniary consequences" of the personal injury "not compensable under RICO." The court also found "loss of educational opportunities" insufficient because a showing of injury required proof of concrete financial loss and this claimed loss of opportunities is "too speculative to be compensable under RICO." 958 F.Supp. at 890. Because this alleged injury failed to meet RICO's concrete injury standard, the court found it "need not determine whether an educational opportunity is 'property' under Texas law." 965 F.Supp. at 890, n. 5.

4. The conflict with the Supreme Court's directive that "injury to business or property" be given a "restrictive significance"

The *Diaz* majority recognizes its approach may allow "more claims to go forward" than the dissent's "more restrictive theory" which follows *Grogan* and *Doe*. App. 9.

Judge Reinhardt concurring in *Diaz* is blunter in his assessment. Expressing his personal disagreement with lenient constructions of RICO, he concludes he has no choice but to go along with them because "we must follow the law as it is determined by the Supreme Court." App. 13. The Supreme Court, he maintains, has "stretched" civil RICO "both in scope and meaning far beyond that which Congress originally intended" such that it "has become through judicial construction a wide ranging act that provides treble damages for all kinds of conduct unrelated to the racketeering activity that Congress sought to control." He argues it is for "our lawmakers" to consider amending RICO "so as to limit it to its original purpose." App. 13.

But, in fact, the *Diaz* majority goes well beyond any "judicial construction" the Supreme Court has given RICO. This Court has never read the injury to business or property language as a RICO welcome mat for any plaintiff who alleges a personal injury which may have had a residual impact on his or her ability to get a job.

Rather, the *Diaz* majority's read is far afield from the guidance the Supreme Court has offered in interpreting the analogous "injury to business or property" language found in section 4 of the Clayton Act. See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), interpreting RICO and the Clayton Act in tandem and stating "[Congress] used the

same words [in both], and we can only assume it intended them to have the same meaning that courts had already given them." Interpreting the phrase in the Clayton Act, the court said, "Congress must have intended to exclude some class of injuries" by the phrase and in fact found it "retains restrictive significance. It would, for example, exclude personal injuries suffered." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1999).

Moreover in *United States v. Turkette*, 452 U.S. 576, 587 (1981), the Supreme Court noted RICO directs that its provisions "shall be liberally construed *to effectuate its remedial purposes.*" (emphasis added.) "Congress enacted RICO . . . for the purpose of 'seeking the eradication of organized crime in the United States.'" *Beck v. Prupis*, 529 U.S. 494, 496 (2000).

RICO's intent and remedial purpose is surely not served by this Ninth Circuit opinion which finds a person's inability to look for a job because he was arrested and imprisoned for a felony conviction which has repeatedly withstood appellate scrutiny constitutes an injury to his business or property interests for RICO purposes.

As the *Diaz* dissent puts it:

> "Instead of giving the 'injury to business or property' requirement 'restrictive' meaning, see *Reiter*, 442 U.S. at 339, as did the Eleventh Circuit in *Grogan* and the Seventh Circuit in *Doe*, the majority's interpretation goes far to read the 'business or property' requirement out of the statute, as there likely may be an indirect, hypothetical, and derivative loss of wages whenever there is a personal injury of a person who is otherwise employed. (Fn. omitted.)" App. 35.

C. *Diaz's* sole reliance on state tort law to define a property interest for RICO purposes threatens uniform application of this federal law, conflicts with the approach of other circuits, and contravenes RICO's intent

The *Diaz* majority determined it should look to state law to define what constitutes a property interest under RICO. In so doing, the majority said it was following what it believed was the "best reasoned approach" – that of the Seventh Circuit in *Doe v. Roe*, 958 F.2d at 768. Yet, as discussed above, *Diaz* is in direct conflict with *Doe* which rejected RICO standing based on an allegation of lost wages and other economic consequences which were "plainly derivatives" of a personal injury. 958 F.3d at 770.

Nor did *Diaz* give any heed to the Seventh Circuit's admonition that,

> "Of course, we are not required to adopt a state interpretation of 'business or property' if it would contravene Congress' intent in enacting RICO." *Doe v. Roe*, 958 F.2d at 768, citing *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946.)

Consistent with the Seventh Circuit's warning that role of state law in defining federal RICO standing should be a flexible one, the First Circuit recognized that rigid adherence to state law to define a property interest for RICO purposes could threaten uniform application of this federal statute:

> "Some role does exist for state law. There is no general law of property transfers, so the question who owns a piece of property is likely to be settled by state law. On the other hand, one might expect federal law should decide whether a given

> interest, recognized by state law, rises to the level of 'business or property,' or whether 'injury' has been done to it by the acts alleged. Where to set the 'business or property' threshold depends on federal statutory purpose, and that purpose is likely to support a definition that is uniform throughout the country." *DeMauro v. DeMauro*, 115 F.3d 94, 96-97 (1st Cir. 1997). (footnote omitted.)[3]

The Fifth Circuit in *Patterson v. Mobile Oil Corp.*, 335 F.3d 476, 492 (5th Cir. 2003), citing *DeMauro*'s approach, also emphasized that RICO standing requires more than an ability to recite a loss to something that constitutes a property interest under state law. *Patterson* rejected a RICO claim based upon an employer's failure to comply with state workers' compensation law noting that "[t]his cause of action seems to stretch the bounds of RICO far beyond its intended purpose." 335 F.3d at 492. "If the federal threshold for 'business or property' depends on the statutory purpose, then it seems clear that the instant RICO claims are meritless." 335 F.3d at 492, citing *DeMauro*, 115 F.3d at 96.

Again consistent with the Seventh Circuit's nod to state law but a constant eye on RICO's purpose, the Fifth

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[3] Indeed, rigid reliance on state law to define a property interest would lead to incongruous results not only between states with differing definitions of property, but also within a state. For example, in Puerto Rico, for procedural due process purposes, career employees have a property interest in continued employment (*Gonzalez de Blasini v. Family Department*, 377 F.3d 81, 86 (1st Cir. 2004)), but at-will employees do not. *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 111 (1st Cir. 2003). Thus, by *Diaz*'s reasoning, the career employee who lost his job due to his alleged unlawful conviction would have RICO standing but the at-will employee would not.

Circuit in *Price v. Pinnacle Brands,* 138 F.3d 602, 607 (5th Cir. 1998), citing *Doe,* agreed "[c]ourts may look to state law to determine, for RICO purposes, whether a property interest exists, ..." But, the court warned, "[i]t does not follow that any injury for which a plaintiff might assert a state law claim is necessarily sufficient to establish a claim under RICO. [footnote omitted.]" Thus, the court accepted the defense's argument that Price had not stated a RICO claim merely because a gambling victim "has a state law remedy to recover an amount equal to a multiple of the money spent to gamble." 138 F.3d at 607.

In direct conflict with these cases, the *Diaz* majority sanctioned a RICO lawsuit merely because Diaz might be able to assert a state *tort* claim; but the court gave no deference to RICO's purpose and the need for federal uniformity. Looking to California tort law, the court determined Diaz's allegations that he was "unable to pursue gainful employment" and that he "suffered a material diminishment of his employment prospects" (Complaint 16) amounted "to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law." App. 7. Therefore, the court reasoned, if Diaz had a potential state tort claim, he had a property interest which, in turn, meant an automatic green light for a federal RICO action. App. 7.

In so doing, the Ninth Circuit not only took an approach at odds with that of other circuits but violated its own previous mandate that

> "RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. University Student Coop. Ass'n,* 965 F.2d 783, 786 (en banc) (9th Cir. 1992).

As the *Diaz* dissent notes,

> "The majority's view here takes RICO beyond the bounds that were set by Congress. Indeed, the majority strains to expand RICO for no good reason as well, because persons with asserted injuries like those urged by Diaz have a plain and satisfactory remedy in bringing a 42 U.S.C. § 1983 action, if timely asserted, for violation of their civil rights." App. 36.

D. *Diaz's* finding that an expectancy interest in employment constitutes a property interest conflicts with Supreme Court law and with circuit law which requires injury to a *tangible* property interest and a *concrete* financial loss for RICO standing

The characteristics of a property interest which the *Diaz* majority crafts exclusively from California tort law is directly at odds with the basic attributes of a property interest identified by the Supreme Court. It also leads to a construction of RICO that contravenes its intent, and contradicts several circuits, including previous Ninth Circuit law, which require injury to a *tangible* property interest and a *concrete* financial loss.

Diaz relies on *Doe v. Roe,* 958 F.3d at 768, for the proposition that state law governs in defining a RICO property interest. (App. 6-7). *Doe,* in turn, cites *Board of Regents v. Roth,* 408 U.S. 564 (1972) for this proposition. But *Roth* teaches,

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a

legitimate claim of entitlement to it." 408 U.S. at 577.

Consistent with this Supreme Court guidelines in *Roth*, several circuits have rejected RICO claims which were premised on mere "expectancy" interests.

First and foremost is the Ninth Circuit which in its previous en banc *Oscar* decision examining RICO, ruled, "[A] showing of 'injury' requires proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest.'" *Oscar*, 965 F.2d at 785, citing *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990).

Oscar, an apartment renter, complained her neighboring drug dealers impacted her quality of life but she had suffered no financial loss to her leasehold interest in her apartment. Potentially, the court reasoned, if she tried to sublet the apartment, she might not be able to obtain full rental value but, "she has not alleged that she ever sublet the apartment, that she ever attempted to sublet the apartment, or even that she ever wished or intended to sublet the apartment. Any supposed loss is therefore purely speculative." 965 F.2d at 787. Moreover, any loss she suffered to the "'use and enjoyment' of her leasehold interest" was not a "tangible injury to property." 965 F.2d at 787.

Similarly, the Fifth Circuit rejected the argument that a lost "opportunity" to get a favorable loan because of a RICO scheme is sufficient to constitute an injury that confers RICO standing. "Such lost opportunity by itself does not constitute an injury that confers standing to bring a RICO cause of action. Likewise, because the alleged injury is speculative and does not show a conclusive financial loss, we hold that Anderson's RICO suit fails

for lack of standing." *In re Municipal Taxable Bond Securities Litigation,* 51 F.3d 518, 523 (5th Cir. 1995).

In a RICO case brought by the purchaser of baseball trading cards, the Fifth Circuit found "injury to mere expectancy interests or to an 'intangible property interest'" is not sufficient to establish RICO standing. *Price v. Pinnacle Brands, Inc.,* 138 F.3d at 607. The court found the RICO pleadings "show no 'tangible financial loss' to plaintiffs" who complained of nothing more concrete than an expectancy interest in getting a valuable baseball card in a pack of trading cards. 138 F.3d at 606.

Citing *Price v. Pinnacle Brands* with approval, the Ninth Circuit adopted *Price's* reasoning and reached the same conclusion in *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1087 (9th Cir. 2002), in affirming dismissal of a RICO action brought by trading card purchasers.

The Fourth Circuit in *Regions Bank v. J.R. Oil Co., LLC,* 387 F.3d 721, 729-731 (8th Cir. 2004), followed Fifth and Ninth Circuit law. As a bankruptcy creditor, plaintiff had – at most – a "secondary security interest or contractual right to repayment" but this was no more than an injury to "intangible property interests" and "expectancy interests" with "no showing of actual financial loss." As such, plaintiff lacked RICO standing.

The Third Circuit, citing Ninth Circuit cases including *Oscar*, reiterates the actual, out-of-pocket financial loss requirement for RICO claims. *Maio v. Aetna,* 221 F.3d 472, 483-484. (3d Cir. 2000).

In a district court case that strongly resembles the RICO claim in *Diaz,* the RICO plaintiff claimed that being labeled a sex offender injured his reputation and prevented him

from obtaining employment as a teacher. But he never alleged he was employed as a teacher when he was arrested or that he lost his job because of the arrest. Citing *Board of Regents v. Roth*, 408 U.S. 564, the district court found he "alleged no more than an expectation of employment. He has no property right in this expectation." *Roitman v. New York City Transit Authority*, 704 F.Supp. 346 (E.D. N.Y. 1989).

Even the Ninth Circuit has read *Roth* to mean there are circumstances under which an employed person loses any expectation in continued employment. *Ybarra v. Bastian*, 647 F.2d 891 (9th Cir. 1981). Ybarra, an employee convicted of murdering his colleague, claimed he had a protected property interest in continued employment that required a hearing under procedural due process standards. The Ninth Circuit found any such property interest had been extinguished by his murder conviction and long prison sentence. Those circumstances, the court said, "should have completely eliminated any shred of expectation he might previously have had in future employment." 647 F.2d at 893.

Thus, *Diaz's* conclusion that a RICO plaintiff's allegation that he was harmed in that he lost "employment opportunities" and "employment prospects" satisfies RICO standing is in direct conflict with law which requires a showing of injury to a *tangible* property interest and *concrete* financial loss. A speculative, hypothetical, and, at most, expectancy interest in employment secondary to an alleged personal injury has never been found to satisfy RICO.

CONCLUSION

With little guidance from the Supreme Court in defining RICO standing, the Ninth Circuit has read standing so broadly as to permit a felon serving 37-years-to-life – who has no section 1983 claim because his conviction has withstood all appellate review – to proceed with a RICO suit against the former chief of the Los Angeles Police Department on the theory that as a prisoner he has suffered diminished employment "opportunities" and "prospects".

This read of RICO is directly in conflict with other circuits, with RICO's intent, and with the guidance the Supreme Court has generally provided in reading RICO and defining property interests. For all of the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: November 14, 2005

Respectfully submitted,

ROCKARD J. DELGADILLO,
City Attorney
JANET G. BOGIGIAN,
Assistant City Attorney
Counsel of Record

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DIAZ,

Plaintiff-Appellant,

v.

DARYL GATES; WILLIE L. WILLIAMS; RICHARD ALARCON; RICHARD ALATORRE; HAL BERNSON; MARVIN BRAUDE; LAURA CHICK; JOHN FERRARO; MICHAEL FEUER; RUTH GALANTER; NATE HOLDEN, et al.,

Defendants,

and

BERNARD C. PARKS, Chief of Los Angeles Police Department,

Defendant-Appellee.

No. 02-56818

D.C. No.
CV-01-06400-GAF

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
March 22, 2005 – San Francisco, California

Filed August 16, 2005

Before: Mary M. Schroeder, Chief Judge, Stephen Reinhardt, Alex Kozinski, Andrew J. Kleinfeld, Sidney R. Thomas, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Marsha S. Berzon, Jay S. Bybee and Consuelo M. Callahan, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge Reinhardt;
Concurrence by Judge Kleinfeld;
Concurrence by Judge Berzon;
Dissent by Judge Gould

COUNSEL

Stephen Yagman, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, California, for the plaintiff-appellant.

Janet G. Bogigian, Deputy City Attorney, Los Angeles, California, for the defendant-appellee.

OPINION

PER CURIAM:

We examine whether a false imprisonment that caused the victim to lose employment and employment opportunities is an injury to "business or property" within the meaning of RICO.

Facts

Diaz claims to be a victim of the Los Angeles Police Department's infamous Rampart scandal. He sued over two hundred people connected with the Los Angeles Police Department (LAPD) or Los Angeles city government under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, alleging that LAPD officers had "fabricated evidence" that he had committed assault with a deadly weapon, and that they had "tampered with witnesses and conspired to obtain [a] false conviction" against him, Compl. ¶ 16. As a consequence,

Diaz claims, "[a]mong other forms of injury, [he] lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that [he] was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." Compl. ¶ 31.

Defendant Parks moved to dismiss, arguing, among other things, that Diaz lacked standing because he did not allege an injury to "business or property" as required by RICO. *See* 18 U.S.C. § 1964(c). The district judge agreed and dismissed without prejudice and with leave to amend. Diaz did not amend, and the district judge then dismissed with prejudice. A divided panel of our court affirmed. *Diaz v. Gates,* 380 F.3d 480 (9th Cir. 2004). We took the case en banc. *Diaz v. Gates,* 389 F.3d 869 (9th Cir. 2004).

Analysis

1. The district judge, citing *Oscar v. University Students Co-operative Ass'n,* 965 F.2d 783 (9th Cir. 1992) (en banc), reasonably applied the law of RICO standing as it existed at the time. In *Oscar,* we held that RICO does not provide a cause of action for all types of injury to property interests, but only for injuries resulting in "concrete financial loss." *Id.* at 785. Oscar, a tenant in an apartment building, alleged that she and her co-plaintiff had "lost the use and enjoyment of their 'property' – that is, their rental interest" – as a result of the racketeering activity in their building, which included drug dealing, violence and "other crimes, misdemeanors, nuisances, and annoyances." *Id.* at 784-85. Because Oscar did not own her interest, we reasoned, the only way she could suffer a

financial loss would be "if she had an interest she could sublet and the racketeering enterprise reduced the rent she could charge to sublet her apartment." *Id.* at 787. But Oscar never alleged that she had wanted or tried to sublet the apartment – or, for that matter, that she had a right to do so – rendering "[a]ny supposed loss . . . purely speculative." *Id.* Thus, we concluded that she had not suffered concrete enough financial injuries for purposes of RICO. The only injuries Oscar properly alleged – "personal discomfort and annoyance," *id.* (quoting *Ingram v. City of Gridley*, 224 P.2d 798, 803 (Cal. Ct. App. 1950)) (internal quotation marks omitted) – were personal, and so there was no injury to "business or property" within the meaning of the statute.

Intervening caselaw, which the district judge obviously did not have access to, has clarified the *Oscar* standard. A month after the district judge dismissed Diaz's complaint, we decided *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), where a class of agricultural laborers alleged that their employers had depressed their wages by illegally hiring undocumented workers at below-market wages. The agricultural workers could not "show a 'property right' in the lost wages, by showing that they were promised or contracted for higher wages." But they did allege an injury to a property interest, the "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *See id.* at 1168 n.4. We held this property interest sufficient to provide standing under RICO. *See id.* at 1168. Diaz has alleged just such an interference with his business relations.

2. *Mendoza* did not elaborate on the source of the "legal entitlement to business relations," relegating its discussion of the nature of the injury to a footnote. We

believe the best-reasoned approach is that of *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992), under which we typically look to state law to determine "whether a particular interest amounts to property," *id.* at 768.

Doe sued her divorce attorney Roe under RICO, alleging that Roe had defrauded her and misused his position to coerce her into having sex with him over a period of several years. Doe, who had little money, had left her original divorce attorney and retained Roe on the understanding that her (soon to be ex-) husband would pay any fees beyond the retainer fee she had already paid. She acceded to his sexual overtures because she was afraid that he would otherwise stop working on her case, leaving her unable to afford a new lawyer. Doe's husband eventually caught Doe and Roe in the act and, understandably, refused to pay any of Roe's fees. Roe nonetheless demanded full payment for his legal services, but forgave Doe's debts to him in exchange for continuing sexual relations. *Id.* at 765-66.

Doe argued that Roe's wrongful exaction of sexual services was an injury to property and could therefore support her RICO claim. The Seventh Circuit disagreed: "[W]hether a particular interest amounts to property is quintessentially a question of state law." *Id.* at 768. And "'sexual labor' has no legal value in Illinois, where the courts have long held that contracts for sexual services are unenforceable as a matter of public policy." *Id.* Thus, the requisite business or property interest was missing. *Doe* clearly doesn't stand for the proposition that employment cannot be property under RICO, or it would have been superfluous for the Seventh Circuit to hold that employment as a provider of *sexual* services was not property under state law.

Doe had another theory. After the relationship with Roe turned sour, she alleged, Roe threatened her safety, which made her invest in a home security system and miss several days of work. *Id.* at 769-70; *see also Doe v. Roe*, 756 F.Supp. 353, 356, 359 (N.D. Ill. 1991). Naturally, she also hired a new lawyer. Doe argued that the loss of wages, the costs of the security system and the new lawyer, and other "miscellaneous expenditures," 958 F.2d at 769, were injuries to property. Here, too, the court disagreed:

> Doe blurs the distinction between proprietary and personal injuries. Contrary to what Doe seems to suggest, whether she can show a financial loss does not, by definition, establish that she has suffered a business or property injury within the meaning of § 1964(c). Most personal injuries – loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering, to name a few – will entail some pecuniary consequences. . . .
>
> Doe's loss of earnings, her purchase of a security system and her employment of a new attorney are plainly derivatives of her emotional distress – and therefore reflect personal injuries which are not compensable under RICO.

Id. at 770. Again, although Doe alleged "loss of earnings," this was deemed insufficient to qualify as a business or property interest under RICO "as construed by Illinois law." *Id.* Thus, no injury to a business or property interest was actually alleged.[1]

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[1] The dissent claims that "Doe alleged the same injury to business or property as Diaz: lost employment wages," dissent at 10740 n.7, but it confuses the mere loss of something of value (such as wages) with

(Continued on following page)

We agree with the Seventh Circuit. Without a harm to a specific business or property interest – a categorical inquiry typically determined by reference to state law – there is no injury to business or property within the meaning of RICO.

Contrary to the dissent's suggestion, dissent at 10741-42, our approach does not create RICO liability for every loss of wages resulting from a personal injury. Doe, unlike Oscar, suffered some tangible financial losses as a result of her emotional distress, but, like Oscar, failed to allege harm to any property interest valid under state law. Diaz, on the other hand, has alleged both the property interest and the financial loss. The harms he alleges amount to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 750-51 (Cal. 1995) (discussing torts of "interference with an existing business contract" and "interference with commercial relations"); *see also* Restatement (Second) of Torts § 766A & cmt. e (intentional interference with another's performance of his own contract); *id.* § 766B & cmts. c-d (intentional interference with prospective contractual relations); *Reeves v. Hanlon*, 95 P.3d 513, 517 (Cal. 2004) (interference with performance of contract is intentional if defendant

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injury to a property interest (such as the right to earn wages). The Seventh Circuit gave no indication in *Doe* that the plaintiff had alleged loss of the right to earn wages as a property interest recognized by Illinois law. Thus, *Doe* does not speak to whether a loss of earnings *could* be an injury to a property interest if a plaintiff properly alleges it as such – as Diaz does. *Doe* merely teaches that financial losses, including lost wages, are insufficient by themselves to confer standing under RICO.

knew "that the interference was certain or substantially certain to occur as a result of his or her action"). And his claimed financial loss? He could not fulfill his employment contract or pursue valuable employment opportunities because he was in jail.

3. The three-judge panel tried to distinguish *Mendoza* on the theory that Diaz did not allege "that he lost actual employment, only that he 'was rendered unable to pursue gainful employment.'" *Diaz*, 380 F.3d at 484. This distinction is untenable, for *Mendoza* speaks generally of a "legal entitlement to business relations." 301 F.3d at 1168 n.4. Nor do we endorse such a distinction today, for California law protects the legal entitlement to both current and prospective contractual relations. *See* page 10718 *supra*. There may be a practical difference between current and future employment for purposes of RICO – for instance, it may be easier to prove causation or determine damages for a plaintiff who has lost current employment – but this difference is not relevant to whether there was an injury to "business or property."

Similarly, the dissent seeks to distinguish *Mendoza* on the theory that the farm workers' loss of wages was the "direct target" of the conspiracy, while Diaz's injury was "merely derived from," and a "secondary effect" of, his false imprisonment. *See* dissent at 10731, 10734, 10738, 10742. But this distinction founders on the language of the statute: The only requirement for RICO standing is that one be a "person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). And the Supreme Court has already told us that "by reason of" incorporates a proximate cause standard, *see Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992), which is generous enough to include the unintended, though

foreseeable, consequences of RICO predicate acts, *see Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100-01 (N.Y. 1928).

Though the dissent is wrong to suggest that our approach would confer standing on any plaintiff RICO-suave enough to allege lost employment, it is right to point out that our approach allows more claims to go forward than its more restrictive theory. *See* dissent at 10741-42. But these policy consequences, assuming they are undesirable, cannot blind us to the statutory language. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Supreme Court examined the Second Circuit's narrow interpretation of RICO, which, "[i]n response to what it perceived to be misuse of civil RICO by private plaintiffs," read various limitations into section 1964(c), including the requirement that the racketeering activity have produced a " 'racketeering injury.' " *Id.* at 481. "Racketeering activity" is a broad concept, which "consists of no more and no less than commission of a predicate act." *Id.* at 495. By contrast, a "racketeering injury," under the Second Circuit's definition, was an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496 (2d Cir. 1984). While the Supreme Court "understood] the [Second Circuit's] concern over the consequences of an unbridled reading of the statute," which had expanded far beyond the mob-related concerns that had originally inspired it, *see* 473 U.S. at 481, 499, it rejected such a construction:

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure

> the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id. at 495.

There is similarly no room in the statutory language for an additional, amorphous requirement that, for an injury to be to business or property, the business or property interest have been the "direct target" of the predicate act. The statute is broad, but that is the statute we have. Were the standard as the dissent claims, we would have the anomalous result that one could be liable under RICO for destroying a business if one aimed a bomb at it, but not if one aimed at the business owner, missed and hit the business by accident, or if one aimed at the business owner who happened to be in the business at the time.

The dissent's flawed approach is similar to that of *Grogan v. Platt,* 835 F.2d 844 (11th Cir. 1988). In *Grogan,* FBI agents wounded and slain in a shootout sued the criminal suspects responsible for their injuries and deaths. The Eleventh Circuit denied recovery, even though the plaintiffs had apparently alleged "lost employment opportunities" as one of their forms of injury, *id.* at 848:[2]

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[2] We say "apparently" because the Eleventh Circuit does not tell us how the claim for lost employment opportunities was raised in *Grogan.* It is entirely possible that the plaintiffs in *Grogan,* unlike Diaz, failed to allege a right to employment that was recognized as property under state law. This may be why the court treated it as part of their personal injury claim. If so, *Grogan* is consistent with our approach and that of the Seventh Circuit in *Doe.* What we do know for certain, however, is that the Eleventh Circuit does not expressly address the situation where a plaintiff actually alleges a state-protected property interest, as Diaz does here.

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> We do not hold that plaintiffs may never recover under RICO for the loss of employment opportunities. We merely hold that the appellants cannot recover under RICO for those pecuniary losses that are most properly understood as part of a personal injury claim.

Id. The Eleventh Circuit's "most properly understood as part of" test is subject to the same critique as the dissent's "direct target" test. Diaz suffered two types of injuries: (1) the personal injury of false imprisonment and (2) the property injury of interference with current or prospective contractual relations. Treating the two as separate, and denying recovery for the first but letting the suit go forward on the second, is both analytically cleaner and truer to the language of the statute.

4. If Diaz properly alleges that his injuries were "by reason of a violation of section 1962," there is nothing to prevent him from "su[ing] therefor." *See* 18 U.S.C. § 1964(c). Diaz's complaint tracks the language of section 1962, which makes it illegal to, among other things, acquire or maintain control of an "enterprise," or conduct or participate in its affairs, through a "pattern of racketeering activity." *Compare id.* § 1962(b)-(c) *with* Compl. ¶¶ 26-27. Diaz alleges that the LAPD and various subdivisions are

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The dissent speculates that Diaz must be in the same position as Grogan, because "[w]e have no clue from Diaz's complaint what 'employment' Diaz has alleged to have lost." Dissent at 10741. That misses the point. We may not know precisely what type of employment Diaz alleges to have lost, but we know that Diaz alleges that his lost employment is an injury to a property interest as defined by state law. Reading *Grogan*, we know nothing about how Florida law treated the right to earn wages at the time Grogan brought his lawsuit, nor whether he claimed that his loss amounted to a property interest.

"enterprises" within the meaning of 18 U.S.C. § 1961(4). *See* Compl. ¶ 23. And he alleges acts that seem to fall within the definition of "racketeering activity," 18 U.S.C. § 1961(1), and seem to form a "pattern," *id.* § 1961(5).[3]

Whether these allegations of section 1962 violations are adequate is a matter on which we express no view.[4] The district judge stated that Diaz's complaint "suffer[ed] from many of the same deficiencies . . . previously identified" in another Rampart-related case, *Serrano v. City of Los Angeles*, No. CV 00-13356 GAF (AJWx) (C.D. Cal. June 29, 2001) (order dismissing RICO claims), but his dispositive ruling on standing made it unnecessary for him to state precisely which of these deficiencies applied to Diaz's case. We need not determine whether the district judge's incorporation by reference of "many" of the deficiencies identified in a different case was sufficient to provide adequate notice of the particular deficiencies. *Cf. Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962). Now that we have set aside the district court's ruling as to standing, the district judge should, if he wishes to reinstate the order of dismissal, identify the specific deficiencies in a supplementary order, and plaintiff should then be given an opportunity to amend his complaint accordingly.

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[3] Because the district court only addressed whether plaintiff alleged a proper injury, and not whether the injury was "by reason of" the RICO violation, we decline to address the RICO causation requirement in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

[4] Nor, at this early stage of the litigation, do we deem it appropriate to speculate as to the merits of Diaz's claim. *Cf.* dissent at 10731 n.1 ("An observer might wonder if there is any substance at all to the RICO claim asserted by Diaz.").

REVERSED AND REMANDED.

REINHARDT, Circuit Judge, concurring:

I concur in the court's per curiam opinion as well as in Judge Kleinfeld's separate concurrence. I share Judge Kleinfeld's view that, given the construction that RICO has been afforded by the Supreme Court, we are no longer free to read it as an anti-racketeering statute. Rather, starting with *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-500 (1985), it has been stretched both in scope and meaning far beyond that which Congress originally intended and has become, through judicial construction, a wide ranging act that provides treble damages for all kinds of conduct unrelated to the racketeering activity that Congress sought to control. Although I disagree with this construction, we must follow the law as it is determined by the Supreme Court. In my view, however, it is well past the time for our lawmakers to take another look at RICO and consider amending the statute so as to limit it to its original purpose.

KLEINFELD, Circuit Judge, with whom REINHARDT and BERZON, Circuit Judges, join, concurring:

I concur in the result. I write separately because my analysis differs from that in the majority unauthored opinion. I focus on the language of the statute. *Mendoza v. Zirkle Fruit Co.*[1] does not bind us, and in any event speaks mostly to causation rather than standing. *Grogan v. Platt*[2]

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[1] *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

[2] *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988).

and *Doe v. Roe*,[3] the Eleventh and Seventh Circuit cases, strain RICO's statutory language. A careful reading of the statute cannot be reconciled with the "personal injury" exclusion in the Seventh and Eleventh Circuit cases.

The RICO statute tells us what kinds of injuries give rise to RICO claims. Some are in the nature of "personal injury" claims, and some are not. The section stating what gives rise to a claim, section 1964, says "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court."[4] The words telling us what kind of wrong gives rise to a claim are "by reason of a violation of section 1962." The phrase "injured in his business or property" is a further limitation, speaking not to the nature of the wrong, but rather to the nature of the harm caused by the wrong. The word "therefor" in the phrase "may sue therefor" is a further limitation on the damages that can be awarded. The language telling us what kind of wrong gives rise to a claim, though, is "by reason of a violation of section 1962." That is the only literal reading possible, and it makes perfect sense.

Section 1962, which section 1964 tells us defines the violations giving rise to civil claims, says "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of *racketeering activity* or collection

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[3] *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992).

[4] 18 U.S.C. § 1964(c).

of unlawful debt."[5] This language says quite plainly that two kinds of wrongdoing violate this law: collection of an unlawful debt (not involved in this case) and "racketeering activity." Again, this is the only literal reading possible, and it makes perfect sense.

The phrase "racketeering activity" is defined in section 1961. That extensive definition includes both direct injury to tangible property, such as "arson," and also various kinds of wrongdoing that constitute "personal injury." Among the "personal injury" wrongs that can constitute "racketeering activity" are "murder" and "kidnapping." "Murder" is not an injury to business or property. It is a personal injury to a human being. Likewise kidnapping is also a personal injury to a human being. Murder and kidnapping fall within the "personal injury" torts of "wrongful death" and "false imprisonment." There is no legitimate way to read the statute to exclude traditional personal injuries from actionable RICO racketeering conduct, because traditional personal injuries, including murder and kidnapping, are expressly listed in section 1961 as "racketeering" conduct that can give rise to claims under the statute.

Here is the plain and express logic of the statute: (1) section 1964 establishes a civil cause of action for a violation of section 1962; (2) section 1962 uses a term of art defined in section 1961 to denote violations; (3) section 1961 expressly provides that various personal injuries, as well as other kinds of wrongdoing, constitute the misconduct giving rise to a cause of action. I see no way around this plain language of the statute. That is why I part ways

[5] 18 U.S.C. § 1962(c) (emphasis added).

from *Grogan* and *Doe*, the Seventh and Eleventh Circuit cases holding that personal injury claims cannot give rise to RICO standing. If they were right, then the words "murder" and "kidnapping" in the statute would have to be wrong, which is impossible. Our tools of statutory construction do not include an eraser.

That is not the end of the standing inquiry. Conduct "by reason of" a section 1962 violation is necessary, but not sufficient, for standing.[6] For a complaint to state a claim upon which relief can be granted, the plaintiff must allege not only a section 1962 violation but also that he was "injured in his business or property." This second requirement is more of a problem for Diaz. The problem, though, is not whether the gravamen of his complaint is "personal injury," because even if he alleged nothing but personal injury, that could plainly be a section 1962 violation. The problem is whether the personal injury caused injury to business or property. Not everyone who suffers a racketeering injury denoted by section 1962 can state a claim under section 1964. Only those to whom the racketeering conduct caused injury to business or property can state a claim.

Murder or kidnapping can cause injury to business or property, as well as personal injury. Suppose America suffered the frequent kidnapping for ransom of business executives that some countries do. If the business pays the ransom, it has been injured by the kidnapping. Or imagine

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[6] I have used the word "standing" here because the RICO cases generally use it. I am among those who prefer to use the term "standing" for Article III purposes, and would prefer that the analysis be made under the rubric of "stating a claim upon which relief can be granted under section 1964." They come to the same thing here.

that a person whom a business needs to function is murdered – perhaps a medical researcher who employs himself through an incorporated laboratory and obtains millions of dollars in research grants and contracts, and employs dozens of other people. The murder may well destroy the business, make it unable to pay its debts, and put all the employees out of work, giving them claims against the business for breach of their employment contracts. The laboratory corporation is a "person injured in his business" "by reason of" a section 1962 violation – murder. In these hypotheticals, I assume, of course, that a racketeering enterprise committed the wrongful conduct and that the section 1962 conduct caused the harm. The significance of the hypothetical cases is to illustrate that section 1962 personal injuries, such as murder and kidnapping, may indeed give rise to "injury to business or property" under section 1964.

-Diaz's claim to be a "person injured in his business or property" is more tenuous than the victims' claims in these hypothetical cases, but sufficient nonetheless. He pleads that, as a result of the putative RICO wrong, he lost the chance to get employment because he was in jail or absorbed with defending himself against the criminal charges he claims were the fraudulent result of police racketeering. That states a claim that he was "injured in his business."

A person does not have to wear a suit and tie to be engaged in "business." A salaried employee might or might not, in ordinary speech, be characterized as a "businessman," but a sole proprietor of a service business unquestionably runs a "business." For example, the owner of "AAA Snowplowing" is a businessman who owns a service business, and makes his living from it when he comes

around with a blade on the front of his pickup truck after a snowfall. Dentists and lawyers are also businessmen who own and run businesses. So is a person who stands on a corner and waits to get picked up to do odd jobs as an independent contractor. There is no principled way to sort out who among sole proprietors has a "business" and who does not. They all do.

What about people who seek only to be employed, in the common law sense of a master-servant relationship, by someone else? Diaz's complaint is not clear on whether this is all he meant to do, or whether he meant to sell his services as a sole proprietor. Sound statutory construction proceeds from "attributing a rational purpose to Congress."[7] As Judge Learned Hand wrote, "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[8] If the statute as construed one way makes sense, and as construed another does not make any sense and is wholly arbitrary, the wholly arbitrary construction is a dubious attribution of fecklessness to the legislature. I cannot see what purpose Congress could have intended to serve by limiting "person injured in his business" to some forms of earning a living but not others. Many firms operate in part with common law employees and in part with independent contractors, and many individuals work sometimes as one, sometimes the other, depending on what form of work is more attractive or available at the time. The distinction between "business" and employment is so tenuous and uncertain that it is

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[7] *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992).

[8] *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

hard to see why we should attribute to Congress a purpose of making it, especially since they did not make it expressly.

The manifest statutory purpose of requiring not only injury "by reason of" section 1962 misconduct, but also injury to "business or property," is to exclude claims for other kinds of injuries, even those arising from denoted racketeering conduct. For example, a person who suffered physical injury and mental distress, but no injury to his business or property, on account of racketeering misconduct of the sort denoted in sections 1962 and 1961, could not state a claim upon which relief could be granted under section 1964. Congress likely chose to address this sort of harm in order to focus upon the harm racketeering does to interstate commerce.

As for our en banc decision in *Oscar v. University Students Co-operative Association*,[9] it is not much help in resolving this case. The issue in *Oscar* was whether the plaintiffs were "injured in [their] business or property" by drug dealing next door. The majority in *Oscar* did not think so because the reduction in the value of the apartments they rented was not "financial loss to property"[10] or "concrete financial loss."[11] I dissented, taking the position in dissent that there was injury to property because a leasehold estate is itself property, and damage does not have to be "concrete" or "financial" to be property damage. My thought was that the majority could not be right that

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[9] *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783 (9th Cir. 1992) (en banc).

[10] *Id.* at 787.

[11] *Id.* at 785.

damage has to result in "concrete financial loss" to give rise to a claim. For example, if racketeering conduct on the freeway dents someone's car, the car's owner has suffered injury to property, even if he drives with the dent and neither gets the car fixed nor sells it. He does not suffer any "concrete financial loss," because he has the same amount of money that he did before, but his property was injured.

Judge Gould makes the sensible point that claims such as this one for police misconduct ordinarily are and should be brought under 42 U.S.C. § 1983. I do not disagree, but I also do not see much risk of opening any floodgates by taking the words of the RICO statute to mean what the Supreme Court has told us they mean.[12] Though the RICO statute allows treble damages, the damages it allows, and allows to be trebled, are limited to injury to business or property. That limitation, particularly in light of the limited business and property of a considerable proportion of persons who are arrested, makes section 1983 a more attractive path for relief in most cases, and there is little practical need for us to put an artificial dam in the channel.

The lower courts have repeatedly adopted non-literal narrowing interpretations of RICO, so that it would apply only to what "racketeering" would mean if the word were not converted into a special term of art by the statute as construed by the Supreme Court. The lower courts' view has a lot of practical and linguistic appeal. And who can hear the word "RICO" without seeing in the mind's eye,

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[12] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-500 (1985).

Edward G. Robinson, in Little Caesar?[13] But the Supreme Court has decided that RICO's statutory language just does not permit the courts to limit it to dishonest businesses that make their money through fraud and extortion. When it was passed, many ascribed to RICO the purpose of facilitating remedies against "mobsters and organized criminals."[14] As the Supreme Court has construed the words of the statute since then, though,[15] there is no way to corral RICO so that it would apply only to "racketeering" as that word may initially have been understood and as it is defined in the dictionary.[16] I agree with Judge Gould that, because of his attempted murder and assault convictions, Diaz will likely face an uphill battle against a motion for summary judgment. But this is a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). We are limited to the question whether, if proved, the averments of the complaint would state a claim under the statute. They do.

BERZON, Circuit Judge, concurring:

I concur in the court's per curiam opinion as well as in Judge Kleinfeld's separate concurrence.

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[13] *Little Caesar* (Warner Bros. 1931).

[14] *Sedima*, 473 U.S. at 499.

[15] *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-262; *see also Sedima*, 473 U.S. at 499-500.

[16] *See The American Heritage Dictionary* 1021 (2d ed. 1985) (defining "racket" as a "dishonest business or practice, esp. one that obtains money through fraud or extortion").

GOULD, Circuit Judge, with whom SCHROEDER, Chief Judge, BYBEE and CALLAHAN, Circuit Judges, join, dissenting:

I respectfully dissent, and would affirm the district court's decision that there was no standing under RICO because Diaz's complaint did not sufficiently allege an "injury to business or property" within the meaning of the statute.

The majority acknowledges that the district court "reasonably applied the law of RICO standing as it existed at the time," Maj. Op. at 10714, but then concludes that the reasoning of our intervening decision in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), now requires reversal. *Mendoza's* determination of standing was understandable on its facts, where the conspiracy challenged under RICO was aimed directly at suppressing the wages of farm workers. There the plaintiffs, legal agricultural laborers in eastern Washington, the heartland of Washington's fruit industry, in their RICO complaint had pleaded that the defendant fruit growers' scheme was illegally and systematically to hire undocumented immigrants in order to depress the wages of documented workers. *Id.* at 1166-67. But in that case we did not address the situation we face here, where the alleged loss of employment is merely an indirect and secondary effect of a non-compensable personal injury, Diaz's alleged "false" imprisonment.[1] Thus *Mendoza* is plainly distinguishable

[1] Diaz was convicted on charges that he alleges were trumped up, relying on the Rampart scandal that tarnished the Los Angeles Police Department. The premise that he was "unjustly incarcerated" – which is the underlying basis of his RICO claim – is highly questionable. We granted the appellee's motion that we take judicial notice, pursuant to

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in so far as the illegality there alleged was aimed at the workers' wages. The majority errs in improvidently extending *Mendoza*, in which the illegal scheme took dead aim at wage levels and workers' livelihoods, to apply here, in a case nothing like it. In any event, because we sit en banc to review Diaz's case, we are not bound by a prior panel opinion, so *Mendoza* poses no barrier to the majority analyzing the law of RICO standing.

I would hold that Diaz's claim of employment loss was derived from, and a secondary effect of, his alleged false imprisonment, and any economic losses are part of Diaz's injury to his person, not distinct injuries to his business or property within the meaning of RICO. By extending *Mendoza*, the majority creates a split with the Eleventh Circuit decision in *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988), and the Seventh Circuit decision in *Doe v. Roe*, 958

Federal Rule of Evidence 201, of the post-conviction decisions rendered in appellant Diaz's criminal case. The California Court of Appeal affirmed Diaz's 1999 conviction for "attempted murder, aggravated mayhem, assault by means likely to produce great bodily injury, and assault with a semiautomatic weapon, with enhancements for discharging a firearm causing great bodily injury, firearm use and infliction of great bodily injury," and the California Supreme Court and United States Supreme Court denied his petitions for further review. *See People v. Diaz*, 115 Cal. Rptr. 2d 799, 801-02 (Cal. Ct. App. 2002), *reh'g denied* (Feb. 22, 2002), *review denied* (Apr. 17, 2002), & *cert. denied*, 537 U.S. 907 (2002). Diaz subsequently filed a federal habeas petition in the United States District Court for the Central District of California, which has been denied by the district court. Moreover, in that habeas petition, Diaz argued only that his right to a fair trial and due process were violated by the removal of a juror; he did not contest the sufficiency of evidence to support his conviction. An observer might wonder if there is any substance at all to the RICO claim asserted by Diaz. Because I conclude the district court correctly found no standing, I need not address other grounds for affirmance that may be supported by the record.

F.2d 763 (7th Cir. 1992), both of which held that pecuniary losses incurred as a result of personal injuries were non-compensable under RICO.

I

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, provides a civil remedy of treble damages to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." *Id.* at § 1964(c). *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."). It is well-established that not all injuries are compensable under RICO, *id.* at 496-97, and a previous en banc panel of our court held that the language of 18 U.S.C. § 1964(c) excluded recovery for personal injuries, *Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc) ("[I]t is clear that personal injuries are not compensable under RICO.").[2]

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[2] Our holding in *Oscar* that personal injuries are not compensable under RICO is in accord with the decisions of our sister circuits, *see, e.g., Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995); *Libertad v. Welch*, 53 F.3d 428, 437 (1st Cir. 1995); *Roe*, 958 F.2d at 767; *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918-19 (3d Cir. 1991); *Grogan*, 835 F.2d at 847; *Drake v. B.F. Goodrich, Co.*, 782 F.2d 638, 644 (6th Cir. 1986), as well as in step with the analogous guidance of the Supreme Court. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (interpreting RICO and the Clayton Act in tandem and stating that "[Congress] used the same words [in RICO and the Clayton Act], and we can only assume it intended them to have the same meaning that courts had already given them."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (construing the same "business or

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In *Oscar,* the tenants of an apartment building brought a RICO action against a neighboring student cooperative seeking to recover for losses due to the students' unruly behavior in the neighboring apartment. *Id.* at 784-85. Our en banc panel affirmed the district court's dismissal of the plaintiffs' claims because the tenants did not allege an injury to business or property cognizable under RICO. *Id.* at 785. Our decision rested on two bases. First, we held that a showing of injury requires "proof of concrete financial loss" and is "not actionable under RICO unless [it] result[s] in tangible financial loss to the plaintiff." *Id.* at 785 (citing *Berg v. First State Ins. Co.,* 915 F.2d 460, 464 (9th Cir. 1990)). The plaintiffs failed to allege any pecuniary injury to their property, because, as renters, they did not own the property, and therefore could not allege property value decline because of the alleged acts of their neighbors. *Id.* at 786-87.

Second, we concluded that the tenants' injury was not an injury to their property; rather, the injury asserted was for "the personal discomfort and annoyance" of the defendants' nuisance activities, which, as a "personal injury action," was not actionable under RICO. *Id.* at 787-88 ("It is clear, however, that any injury [the plaintiffs have] suffered is at core an intangible personal injury, not a

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property" language in the Clayton Act and holding that "[t]he phrase 'business or property' also retains restrictive significance. It would, for example, exclude personal injuries suffered."); *see also Sedima,* 473 U.S. at 509, 105 S.Ct. 3275 (Marshall, J., dissenting) ("In addition, the statute permits recovery only for injury to business or property. It therefore excludes recovery for personal injuries."); *but cf. Khurana v. Innovative Health Care Sys., Inc.,* 130 F.3d 143, 149 (5th Cir. 1997). Although three judges of our circuit dissented in *Oscar,* they, too, agreed that personal injuries are not compensable under RICO. 965 F.2d at 789 (Kleinfeld, J., dissenting).

financial loss to property."). We held that a personal injury action like nuisance is not actionable, "even when it flows from a valuable property interest." *Id.*

Under *Oscar,* then, a claim of false arrest and imprisonment, as a personal injury, is not compensable at all in a RICO action. *See, e.g., Owens v. Okure,* 488 U.S. 235, 240-41, 251 (1989) (explaining that § 1983 claims based on false arrest and imprisonment are "best characterized as personal injury actions" and are subject to a state's statute of limitations for personal injuries); Black's Law Dictionary 790 (7th ed. 1999) (defining "personal injury" to include "false imprisonment"). Diaz's allegation of lost employment wages, even construed most favorably to Diaz,[3] was at best merely derived from, and a secondary effect of, his underlying injury of alleged false imprisonment. This circumstance, which was not raised in *Mendoza,* squarely presents the question whether an injury to business or property sufficient for RICO standing purposes can be derived from a non-compensable personal injury.

In our prior en banc decision in *Oscar,* as in *Mendoza,* we did not directly address this question. However, in *Oscar* we did cite approvingly two cases from sister circuits that

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[3] Diaz's complaint alleged numerous injuries, the relevant one being, "lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." Depending on how one reads the complaint, Diaz either alleged the loss of employment while he was incarcerated, or he alleged the loss of the ability to pursue gainful employment, or both. Construing Diaz's complaint generously, as we must in reviewing a 12(b)(6) dismissal, *see, e.g., Pegram v. Herdrich,* 530 U.S. 211, 230 n.10 (2000), the allegation is sufficient to raise the issue of loss of actual employment.

had answered this question by concluding that a plaintiff's allegations of lost employment were insufficient for RICO standing if they were derived from non-compensable personal injuries. *See Oscar,* 965 F.2d at 786 (citing *Grogan,* 835 F.2d at 846-47); *id.* at 788 (citing *Doe,* 958 F.2d at 770).

In *Grogan,* the estates of deceased federal agents involved in a shootout with criminal suspects brought an action against the suspects seeking damages under RICO. The appellants argued that "injury to business or property" included the economic damages that resulted from the injury to the person, such as lost employment or wages. The Eleventh Circuit concluded that the surviving relatives could not recover under RICO for the loss of earning power or employment resulting from their wrongful death claim, holding that the predicate RICO act of the killing of the officers (murder or wrongful death) was a personal injury, not an injury to their "business or property" for purposes of RICO, even though there were tangible economic consequences that resulted from the deaths. *Id.* at 847 ("In our view, the ordinary meaning of the phrase, 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom."). The Eleventh Circuit in *Grogan* concluded that if Congress had intended the derivative economic damages like the loss of employment to be recoverable under a civil RICO suit, it would not have used the restrictive "business or property" language of 18 U.S.C. § 1964(c). *Id.* ("Had Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which will cause some financial loss,* it could have enacted a statute referring to injury generally, without any restrictive

language.") (quoting *Morrison v. Syntex Labs., Inc.*, 101 F.R.D. 743, 744 (D.D.C.1984)).

In *Doe*, the Seventh Circuit considered a case in which a female client had sued her former divorce attorney under RICO for damages stemming from misuse of his position to coerce and intimidate her into having sexual relations with him. 958 F.2d at 765-67. The plaintiff alleged injury to her business and property through, *inter alia*, a loss of employment wages, which she alleged were cognizable injuries to her property under RICO. *Id.* at 766, 769-70. The Seventh Circuit disagreed, holding that the plaintiff's claim of lost employment pay stemmed from emotional distress, a personal injury, and that "[t]he terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom." *Id.* at 767, 770. The court concluded:

> Doe blurs the distinction between proprietary and personal injuries. Contrary to what Doe seems to suggest, whether she can show a financial loss does not, by definition, establish that she has suffered a business or property injury within the meaning of § 1964(c). Most personal injuries – loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering, to name a few – will entail some pecuniary consequences. . . . Doe's loss of earnings, her purchase of a security system and her employment of a new attorney are plainly derivatives of her emotional distress – and therefore reflect personal injuries which are not compensable under RICO.

Id. at 770.

II

Because we cited both *Grogan* and *Doe* favorably in our previous precedent,[4] it is not surprising that the district court relied on them, in conjunction with *Oscar,* in dismissing Diaz's complaint for lack of standing. In my view the district court properly applied the law. The majority almost recognizes this, but then holds that our decision in *Mendoza* vitiates the district court's reliance. However, as I have mentioned above and now reiterate, *Mendoza* did not raise the issue we face, is distinguishable, and cannot properly be extended to apply here.

In *Mendoza,* the documented farm workers who brought suit asserted a RICO claim alleging that the eastern Washington fruit grower defendants had conspired to hire undocumented workers in order to depress the documented workers' wages. *Id.* at 1166-67. The farm workers' complaint alleged that the fruit growers knowingly hired illegal alien workers because they knew that the undocumented workers would be forced to accept wages significantly lower than that which would otherwise be paid to legally authorized workers. *Id.* We held that the plaintiff farm workers sufficiently alleged an injury to

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[4] *See Oscar*, 965 F.2d at 786 (citing *Grogan* in support of its holding that personal injuries are not compensable under RICO); *id.* at 788 (citing *Doe*); *id.* at 791 (Kleinfeld, J., dissenting) (citing *Grogan* for the holding that the presence of pecuniary losses cannot transform a personal injury into an injury to property); *see also Berg*, 915 F.2d at 463 (quoting *Grogan* at length and concluding that "[w]e follow the Eleventh Circuit and hold that, as a matter of law, personal injury, including emotional distress, is not compensable under section 1964(c) of RICO. Even if the directors had incurred pecuniary losses from emotional distress, they would not be compensable under RICO.").

their property in the form of lost employment wages. *Id.* at 1168 & n.4.[5] Relying on *Mendoza*, the majority now concludes that Diaz's claim of lost employment wages when he was imprisoned is similarly sufficient to allege injury to his business or property. Maj. Op. at 10715.

Although we said in *Mendoza* that "[t]he employees allege[d] an injury to their property in the form of lost wages," in that case the loss of the farm workers' employment wages was the direct target of the RICO predicate act, a scheme designed to drive down farm labor prices by using illegal workers. 301 F.3d at 1168-69 ("[T]he employees allege that the illegal hiring scheme was divined in order to depress the normal labor market."), *id.* at 1170 ("[T]he alleged scheme here was intended to give the growers a contract advantage at the expense of the documented workers, a direct . . . injury."). It was not a case, like Diaz's, where the alleged loss of employment was solely an indirect effect of a personal injury to Diaz (his false imprisonment). Stated another way, the lost income to laborers in *Mendoza* was not a secondary or derivative consequence of a personal injury to the farm workers, but rather the direct result of the scheme that aimed at lowering their wages. Diaz has not alleged (nor can he) that his false imprisonment was in any way related to, or directed at, his business or property. Diaz's allegation is much more like that in *Grogan*, where the employment

[5] The panel in *Mendoza* stated: "[W]hat is required [to sufficiently allege injury to business or property] is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Id.* at 1168 n.4. In context the rule of *Mendoza* does nothing more than give RICO standing when the wages of employees are directly hampered by an alleged illegal scheme.

losses directly stemmed from another type of personal injury – wrongful death – than like that in *Mendoza*, where the loss of wages alleged as injury had been the precise aim of the alleged illegal conduct and conspiracy of growers.[6]

III

The majority acknowledges that in *Mendoza* we did not "elaborate" on the question at bar, "relegating its discussion of the nature of the injury to a footnote." Maj. Op. at 10715. As I have explained above, that case should not be interpreted to apply, especially where doing so creates a circuit split, runs against the declared aims of Congress, and is in tension with Congress's language of RICO. Instead of extending *Mendoza* to the case of Diaz so unlike it, I would simply follow the Seventh and Eleventh Circuits by holding that Diaz's claim of employment loss was derived from, and a secondary effect of, his allegedly

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[6] In any event, we sit en banc and are not bound by the *Mendoza* panel decision. *See* Fed. R. App. P. 35(a); Ninth Cir. R. 35-1; *Thompson v. Calderon*, 120 F.3d 1045, 1051 (9th Cir. 1997), *rev'd on other grounds*, 532 U.S. 538 (1998). It might make sense to defer to a previous panel's persuasive analysis of the difficult question posed by Diaz's case but that is not the case with *Mendoza* which neither pondered nor ruled on the standing issues raised by a claim incidental to personal injury. Further, the panel in *Mendoza's* self-described "key task" was the causation inquiry of RICO standing: to "determine whether [the farm workers'] injury was 'by reason of' the growers' alleged violations." 301 F.3d at 1168. While the panel discussed causation for four pages, *id.* at 1168-72, it only touched upon the "injury to business or property" requirement in one textual sentence and accompanying footnote. *Id.* at 1168 & n.4. As I have explained, *Mendoza's* statement on injury to business or property can be understood in the context of a conspiracy to depress wage rates, but did not by its own terms or reasoning reach the case of lost income resulting from false imprisonment.

false imprisonment, and any economic losses are part of Diaz's injury to his person, not distinct injuries to his business or property within the meaning of RICO. *See Grogan*, 835 F.2d at 847 (holding that intertwined economic consequences of personal injuries "are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property' "); *see also Oscar*, 965 F.2d at 791 (Kleinfeld, J., dissenting) (citing *Grogan* for the proposition that "murder is personal injury, not injury to property, and pecuniary losses flowing from the wrongful death could not transform personal injury into injury to property").

Realizing that *Mendoza* alone cannot support its holding, the majority purports to rely on *Doe*, describing the Seventh Circuit's approach as the "best-reasoned" one. Maj. Op. at 10715. The majority's reliance is misplaced, and its reading of *Doe* selective and incorrect. The plaintiff in *Doe* alleged several different injuries to her business or property, all of which were found to be non-compensable by the Seventh Circuit. The Seventh Circuit affirmed the district court's dismissal of some of Doe's claims because the court determined that, as an initial matter, the injuries alleged were not injuries to a business or property interest, as determined by the applicable state law. *Doe*, 958 F.2d at 767-68 (affirming the district court's dismissal of Doe's allegation of injury to her business or property from her divorce lawyer's coercive extraction of her sexual services because "sexual labor has no legal value in Illinois," and thus Doe's sexual relations with her former attorney was not an injury to her business or property for purposes RICO). However, Doe also alleged that she missed days of work – her gainful employment – due to the defendant's constant harassment and intimidation of her.

Id. at 766 ("As a result of this pattern of harassment and intimidation, Doe missed work for several days and had to purchase an enhanced security system for her car and garage."). The Seventh Circuit concluded that such an allegation was still insufficient for standing to bring a RICO claim because such injury stemmed from a non-compensable personal injury: "*Doe's loss of earnings,* her purchase of a new security system and her employment of a new attorney are *plainly derivative* of her emotional distress – and therefore reflect personal injuries which are not compensable under RICO." *Id.* at 770 (emphases added) (citing, *inter alia, Grogan,* 835 F.2d at 847). Thus, although the majority fails to recognize it, in *Doe* the Seventh Circuit addressed the same situation we face here – an allegation of lost employment wages stemming from a non-compensable personal injury. Diaz allegedly missed work because he was falsely incarcerated, while Doe allegedly missed work due to the continuous threats and harassment of her former divorce attorney. Both plaintiffs alleged injury to business or property wholly derived from personal injuries (false imprisonment and emotional distress, respectively). This inescapable truth belies the majority's purported reliance on *Doe* for its extension of *Mendoza*; the majority is actually in conflict with *Doe*, just as it is in conflict with *Grogan*.[7]

[7] The majority correctly acknowledges Doe's allegation of lost employment, but incorrectly, and confusedly, concludes that "no injury to business or property was actually alleged." Maj. Op. at 10717. Doe alleged the same injury to business or property as Diaz: lost employment wages. If, as the majority concludes, Doe did not allege any injury to her business or property, then neither has the plaintiff in the case at bar alleged an injury to his business or property.

The majority denies it creates a circuit split with *Grogan*, attempting to disguise, distract, or detract from the circuit split by claiming that the plaintiffs in *Grogan* might not have alleged a loss of employment recognized as property under the applicable state law. Maj. Op. at 10720-21 n.2. The same critique can be made of Diaz: We have no clue from Diaz's complaint what "employment" Diaz has alleged to have lost, if any, while he was "unjustly" incarcerated, and whether that employment would be considered property or business under California law, or not. By comparison, we can say with some certainty what loss of employment wages was alleged in *Grogan* because, unlike in this case, we know for a fact that the plaintiffs in that case were gainfully employed: They were former agents of the Federal Bureau of Investigation who narrowly escaped death in a gun battle with suspected bank robbers, and the estates of those FBI agents who were not so fortunate. *Grogan*, 835 F.2d at 845. The majority should concede that FBI employment would qualify as a state-protected property interest under its own test, and this undermines the majority's argument, resting on the incorrect premise that in *Grogan* no valid state property right was alleged, involved, or evoked.

IV

In *Oscar*, we concluded by quoting with approval from the Seventh Circuit's *Doe*: "Perhaps the economic aspects of [a fundamentally personal injury] could, as a theoretical matter, be viewed as injuries to 'business or property,' but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary." *Oscar*, 965 F.2d at 788 (quoting *Doe*, 958 F.2d at 770). Following this logic, I would today hold that an allegation of lost

employment that flows from a personal injury is not a separate injury to business or property, but rather is a derivative part and parcel of the underlying non-compensable personal injury. *See Grogan*, 835 F.2d at 848 ("We do not hold that plaintiffs may never recover under RICO for the loss of employment opportunities. We merely hold that the appellants cannot recover under RICO for those pecuniary losses that are most properly understood as part of a personal injury claim."). In holding otherwise, the majority opens the RICO door to any plaintiff's lawyer savvy enough to include an allegation that other wrongs lead to any degree of lost employment, leaving district courts and appellate panels the undesirable job of "metaphysical speculation" against which the *Oscar* and *Doe* courts warned. Instead of giving the "injury to business or property" requirement "restrictive" meaning, *see Reiter*, 442 U.S. at 339, as did the Eleventh Circuit in *Grogan* and the Seventh Circuit in *Doe*, the majority's interpretation goes far to read the "business or property" requirement out of the statute, as there likely may be an indirect, hypothetical, and derivative loss of wages whenever there is a personal injury of a person who is otherwise employed.[6] Yet it is wrong in theory and imprudent in practice for us to ignore the restrictive language set by Congress. *Id.* ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). If Diaz's complaint has

[6] The majority argues that my position creates a new requirement for RICO standing that was not set by Congress, but this argument is off the mark. I merely point out that some direct injury to a business or property should be required to meet the statutory element set by Congress, which will be disregarded under the majority's theory because almost any personal injury will cause a loss of some actual or potential employment.

sufficiently stated a claim under RICO, then the majority's decision means that there is no meaningful "injury to business or property" standing limitation at all. The majority's view here takes RICO beyond the bounds that were set by Congress. Indeed, the majority strains to expand RICO for no good reason as well, because persons with asserted injuries like those urged by Diaz have a plain and satisfactory remedy in bringing a 42 U.S.C. § 1983 action, if timely asserted, for violation of their civil rights. I respectfully dissent.[9]

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[9] Statutory standing under 18 U.S.C. § 1964(c) also includes a causation requirement that encompasses factual and proximate causation, including as a "central element[ ]" a "direct relation between the injury asserted and the injurious conduct alleged." *See Holmes*, 503 U.S. at 268-69; *see also Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir. 1999). While the majority does not address this RICO standing requirement, it is not clear that Diaz's complaint sufficiently alleged causation. Any allegedly "injurious conduct" of the defendant-appellee LAPD Chief Parks, was followed by a series of intervening causes independent of Parks before "causing" Diaz's loss of employment: the prosecutor who decided if, when, and how to prosecute Diaz; the state trial judge who presided over the case; the jury who convicted Diaz; and the state courts of appeal that have subsequently affirmed his conviction. *Cf. Anderson v. Ayling*, 396 F.3d 265, 270 (3d Cir. 2005) (holding that there was an insufficient nexus between the alleged RICO injury and the defendants in part because the defendants' actions were "filtered through [a] long chain of intervening causes"). Because I conclude that the district court correctly found no "injury to business or property" within the meaning of RICO, this compels the conclusion that there is no RICO standing, and I need not reach whether Diaz has otherwise satisfied the standing requirement by sufficiently alleging causation. By contrast, because the majority errs by concluding that there is injury to business or property, it also then errs by not addressing the standing requirement of causation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DIAZ,

Plaintiff-Appellant,

v.

DARYL GATES; WILLIE L. WILLIAMS; RICHARD ALARCON; RICHARD ALATORRE; HAL BERNSON; MARVIN BRAUDE; LAURA CHICK; JOHN FERRARO; MICHAEL FEUER; RUTH GALANTER; NATE HOLDEN, et al.,

Defendants

and

BERNARD C. PARKS, Chief of Los Angeles Police Department,

Defendant-Appellee

No. 02-56818

D.C. No.
CV-01-06400-GAF

ORDER AND AMENDED OPINION

Appeal from the United states District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
October 8, 2004 – Pasadena, California

Filed January 20, 2004
Amended August 23, 2004

Before: Melvin Brunetti, Thomas G. Nelson, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Brunetti;
Dissent by Judge Silverman

COUNSEL

Stephen Yagman, Esq., Venice, California, for the appellant.

Janet G. Bogigian, DCA, Los Angeles, California, for the appellee.

ORDER

The opinion filed January 20, 2004, is amended. The amended opinion and Judge Silverman's dissent have been sent for filing.

No subsequent petitions for rehearing and petitions for rehearing en banc may be filed in response to the amended opinion

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OPINION

BRUNETTI, Circuit Judge:

David Diaz appeals the district court's dismissal of his complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Diaz brought suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, alleging wrongful conviction and incarceration. The district court determined that Diaz failed sufficiently to plead injury to "business or property" as required to proceed under RICO. We agree and affirm.

FACTS AND PROCEEDINGS BELOW

The facts generally arise from alleged misconduct of various Los Angeles Police Department (LAPD) officers and other officials as part of the LAPD Rampart scandal. According to plaintiff's complaint, on or about July 13, 1998, Los Angeles Police Officers Armando Rodriguiz, Juan Parga, and Jose Ramirez fabricated evidence to the effect that plaintiff had committed assault with a deadly weapon, tampered with witnesses, and conspired to obtain the false conviction of plaintiff. Plaintiff further alleges that these LAPD officers, along with defendant William Eagleson, fabricated additional evidence to cause plaintiff's false conviction, and that all of them caused the kidnapping of plaintiff.

Due to these activities, plaintiff alleges that he was deprived of his ability to earn a living and suffered economic harm; namely, he asserts that, "[a]mong other forms of injury, plaintiff lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated."

Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) based on the contention that Diaz had not sufficiently alleged injury to business or property as required by the RICO statute. The district court agreed and dismissed Diaz's complaint without prejudice and with leave to amend. Diaz opted to stand by his allegations as originally pled and, in turn, allowed the period for amendment to expire. Upon the district court's subsequent dismissal with prejudice, Diaz appealed to this court.

STANDARD OF REVIEW

A district court's order of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir.1996). The review is limited to the contents of the complaint, *id.*, although all allegations of material fact in the complaint are taken as true and construed in the light most favorable to plaintiff. *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir.1994). The district court's order of dismissal should be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir.1993) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). The court may, however, affirm the district court's dismissal for failure to state a claim on any basis supported in the record. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.1999).

DISCUSSION

RICO provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) (2003). Section 1962, in turn, lists four separate acts which form the basis for RICO liability: (a) to invest income derived from a pattern of racketeering activity in an enterprise; (b) to acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (c) to conduct the affairs of an enterprise through a pattern of racketeering activity; or (d) to conspire to commit any of the above acts. 18 U.S.C. § 1962(a)-(d). A plaintiff must show, therefore, an injury to business or property as well

as a violation of one or more of the four acts above to recover under RICO.

RICO is to be construed broadly, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985); however, despite Congress's expansive design, *see United States v. Turkette*, 452 U.S. 576, 586-87 (1981), and express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947, it is well established that not all injuries are compensable under RICO. *See Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.1992).

To recover under RICO, a plaintiff must demonstrate injury to business or property. A showing of such injury requires proof of concrete financial loss, not "mere injury to a valuable intangible property interest." *Id.* (quoting *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990) (refusing to consider cancellation of insurance policy injury to property; *viz*, the loss of "protection . . . afforded against potential financial loss in the future and the present peace of mind that flows from such protection" constituted personal injury, not injury to property)).

Moreover, this and other courts have consistently held that personal injuries are not recoverable under RICO. *Id.* at 785-86 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 (1979) (dictum); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3rd Cir.1991) (plaintiffs could not recover medical expenses and emotional distress resulting from their exposure to toxic waste); *Berg*, 915 F.2d at 464 (loss of security and peace of mind due to cancellation of insurance policy were not actionable under RICO); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1180 (7th Cir.1989) (harassment and intimidation of litigants in an

attempt to get them to settle lawsuit could not support RICO claim), *rejected on other grounds by Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir.1992); *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir.1988) (family of murder victim could not recover under RICO for economic consequences of murder), *cert. denied*, 488 U.S. 981, 109 S.Ct. 531, 102 L.Ed.2d 562 (1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (damages for physical injury and wrongful death resulting from exposure to toxic waste were not recoverable under RICO)).

Notably, in *Grogan*, cited with approval in both the *Oscar* majority and dissent, the families of murder victims could not recover under RICO for the economic consequences of their relatives' wrongful deaths. *Grogan*, 835 F.2d at 846-47. The *Grogan* court noted that

> [o]ur task . . . is not to decide whether the economic aspects of damages resulting directly from personal injuries could, as a theoretical matter, be considered injury to "business or property," but rather to determine whether Congress intended the damages that plaintiffs seek in this case to be recoverable under civil RICO.

Id. at 846. Upon considering the appellants' argument that a common-sense interpretation of the words "business or property" necessarily included the economic damages that result from injury to the person, the *Grogan* court concluded, "In our view, the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom." *Id.* at 847; *see also Oscar*, 965 F.2d at 791 (Kleinfeld, Hug, and Brunetti, JJ., dissenting) (discussing *Grogan*: "[M]urder is personal injury, not injury to property, and pecuniary

losses flowing from the wrongful death could not transform personal injury into injury to property.").

It is true that some courts have found RICO standing in plaintiffs who alleged lost employment opportunity. The Fifth Circuit found standing in a physician who claimed impairment of his capacity to obtain future employment because his reputation was harmed by his association with RICO defendants. *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 149 (5th Cir.1997) (categorizing lost expectation of earnings as lost business income), *rev'd on other grounds by Beck v. Prupis*, 529 U.S. 494, 505 (2000). Relying on *Khurana*, a district court found RICO standing in a real estate developer who suffered "injury to his professional reputation." *Sadighi v. Daghighfekr*, 36 F.Supp.2d 279, 290 (D.S.C.1999). Another district court found RICO standing in a plaintiff claiming interference with the opportunity to pursue union employment. *Hunt v. Weatherbee*, 626 F.Supp. 1097, 1101 (D.Mass.1986).

At first blush, it might appear that Diaz's alleged injury is at least as tangible as that alleged in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), our most recent decision addressing RICO standing. In *Mendoza*, documented farmworkers brought a RICO action alleging that fruit growers had conspired to hire undocumented workers in order to depress wages. *Id.* at 1166. We held that the plaintiffs had alleged sufficient RICO standing to survive a motion to dismiss. "That wages would be lower if, as alleged, the growers relied on a workforce consisting largely of undocumented workers, is a claim at least as plausible enough to survive a motion to dismiss, whatever difficulty might arise in establishing how much lower the wages would be." *Id.* at 1171. Diaz's claim, however, is distinguishable because he has not alleged that he lost

actual employment, only that he "was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." Although the dissent asserts that defendant Parks conceded that the complaint can be read to allege that Diaz lost actual employment, that is not what the complaint says. Even when construing the complaint in a light most favorable to Diaz, the language of the complaint qualifies the assertion that Diaz lost employment and employment opportunities by stating, "in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated" We hold that this is insufficient to establish standing under RICO, as Diaz has failed to allege an injury to business or property. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (holding that unwarranted inferences are insufficient to defeat a motion to dismiss).

Indeed, Diaz merely alleges the consequential damages of being deprived of his right "to pursue gainful employment." Diaz alleges no out-of-pocket expenses resulting from the wrongful acts of the LAPD officers or other defendants. At most, Diaz's alleged injuries could be characterized as "mere injury to a valuable intangible property interest" in his right to pursue employment. *See Oscar*, 965 F.2d at 785; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (whether a particular interest in considered property is usually a matter of state law); *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 31 (1916) (holding that "right of a citizen to pursue any calling, business, or profession he may choose is a property right . . . "). Nonetheless, such injury is insufficient to satisfy RICO's standing requirement. *See Oscar*, 965 F.2d

at 785 & n.1 (citing *Berg*, 915 F.2d at 464); *see also Allan v. Phillip Morris, Inc.*, 865 F. Supp. 665, 669 (S.D. Cal. 1994) (citing *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992)) ("[T]he Court will not adopt a state interpretation of 'property' that will contravene Congress' intent in enacting RICO.").

Further, much like the plaintiffs in *Grogan*, who pled economic losses stemming from the wrongful death of their relatives, Diaz ultimately alleges injury to his person resulting from his wrongful conviction and incarceration. Losing the right to pursue employment and employment opportunities from false imprisonment is no different than losing such employment opportunities from a wrongful death; the plaintiff in each action incurred some form of personal injury and in turn, suffered economic injuries therefrom. The *Grogan* court specifically rejected the notion that the pecuniary and non-pecuniary aspects of personal injury claims may be separated for purposes of RICO; rather the court noted that economic consequences and personal injuries are often intertwined, and therefore concluded that "pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property.'" *Grogan*, 835 F.2d at 847. Indeed, it reasoned, "had Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which will cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language." *Id.* (citation omitted) (emphasis added by the *Grogan* court)).

Diaz asserts that the Supreme Court decision in *NOW* saves his claim for loss of employment opportunities, as

the Court in that case held that the plaintiffs' allegations that abortion protesters had used "threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics" constituted sufficient injury to business or property to proceed under RICO. *NOW*, 510 U.S. at 253 (quoting Second Amended Complaint ¶ 97). Diaz's argument is unavailing, however. The plaintiffs in *NOW* alleging violations of RICO consisted only of two abortion clinics who complained of harm to their businesses from the protesters' alleged racketeering activities as well as cited losses and harm to their employees, doctors, and patients. Whether the employees, doctors, and patients could withstand a Rule 12(b)(6) dismissal motion if bringing suit on their own behalf was beyond the scope of the *NOW* decision; the Court simply held that the two clinics had sufficiently established standing to sue under RICO. Diaz's injuries do not resemble those averred in *NOW*. While the *NOW* plaintiffs alleged harm to their respective clinic businesses, Diaz's complaint speaks only of personal harm and pecuniary losses stemming therefrom. This type of injury is not the sort Congress sought to redress in enacting RICO. *See Grogan*, 835 F.2d at 847.

Because Diaz failed to allege "injury to business or property," he lacks standing to bring a claim under RICO. Therefore, the district court correctly dismissed his claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court's order of dismissal is AFFIRMED.

AFFIRMED.

SILVERMAN, Circuit Judge, dissenting:

I respectfully dissent.

Diaz alleged that as a result of a predicate RICO act, he "lost employment.[1] I fail to see why this isn't enough to allege injury to his "business or property" and, therefore, to state a RICO claim.

This case is quite unlike *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783 (9th Cir. 1992), in which tenants in a student housing complex brought a RICO action complaining of various forms of "unneighborly behavior" by the people next door. *Id.* at 784. Oscar did not allege any direct financial loss or out of pocket expense. "The only injury she has alleged is a 'decrease in the value of her property' due to racketeering activity next door. We do not believe that such a decrease entails financial loss to Oscar." *Id.* at 786. We pointed out that the owner of the property might have been able to claim a diminution in the fair market value of the property, but that Oscar was a

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[1] The complaint alleges that Plaintiff was injured in his "businesses and/or property" and that he "lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that [he] was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." Complaint at ¶¶ 30, 31. At oral argument, counsel for appellee Parks agreed that, taking this allegation in the light most favorable to the pleader, the complaint can be read to allege that Diaz lost an existing job, in addition to future employment opportunities.

mere tenant. *Id.* at 786-87. The only way she could suffer tangible financial loss, we said, was if she tried to sublet the apartment, which she never alleged. *Id.* at 787.

The *Oscar* scenario is in sharp contrast to the present complaint. Diaz alleges that as a result of racketeering activity by rogue police officers, he was wrongly sent to prison and "lost employment." What could be a more direct financial loss than that? It would seem that Diaz's claim is at least as tangible as that alleged in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), our most recent decision addressing RICO claims. In *Mendoza*, documented farmworkers brought a RICO action alleging that fruit growers had conspired to hire undocumented workers in order to depress wages. *Id.* at 1166. We held that the plaintiffs had alleged sufficient RICO standing to survive a motion to dismiss. "That wages would be lower if, as alleged, the growers relied on a workforce consisting largely of undocumented workers, is a claim at least as plausible enough to survive a motion to dismiss, whatever difficulty might arise in establishing how much lower the wages would be." *Id.* at 1171.

If *lower* wages caused by racketeering activity is a sufficient injury to property or business to withstand a motion to dismiss, why isn't *loss* of wages? As the majority recognizes, several other courts have found such loss sufficient[2] Even *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988), cited with favor by the majority, did not foreclose

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[2] *See, e.g., Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 149 (5th Cir. 1997), *rev'd on other grounds by Beck v. Prupis*, 529 U.S. 494, 505 (2002); *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 290 (D.S.C. 1999); *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1101 (D. Mass. 1986).

the possibility that allegation of loss of wages could withstand a 12(b)(6) motion to dismiss. "We do not hold that plaintiffs may never recover under RICO for the loss of employment opportunities." *Id.* at 848.

It is true that RICO was not designed to redress every garden variety personal injury tort. So how do we sift the wheat from the chaff? *Mendoza* points the way. In *Mendoza,* the farmworker case, we applied to RICO the standard used in the antitrust context. 301 F.3d at 1168-69. We said:

> In this circuit, we focus on three nonexhaustive factors in considering causation, that is whether the injury is 'too remote' to allow recovery:
>
> > (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Id. at 1169 (quoting *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.,* 241 F.3d 696, 701 (9th Cir. 2001)); *see also Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268 (1992) (holding that Congress intended to apply the antitrust proximate cause analysis in RICO).

By limiting RICO to cases of concrete financial loss to business or property directly caused by a predicate RICO act, we recognize RICO's limitations without imposing barriers that were not intended by Congress. "RICO is to

be read broadly, . . . [and] liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.I. v. Imrex Co., Inc.*, 473 U.S., 479, 497-98 (1985); *see also National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 262 (1994). A wage earner's employment *is* his business, The majority's approach in this case is more than just unfair to wage earners harmed by racketeering. It is at odds with the salutary purpose of RICO – to provide an additional weapon in the war against organized crime.

Because Diaz pleaded an injury to his business or property, I would reverse the district court's ruling on that point. I express no opinion on whether the complaint contains other defects.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DIAZ,

Plaintiff-Appellant,

v.

DARYL GATES; WILLIE L. WILLIAMS; RICHARD ALARCON; RICHARD ALATORRE; HAL BERNSON; MARVIN BRAUDE; LAURA CHICK; JOHN FERRARO; MICHAEL FEUER; RUTH GALANTER; NATE HOLDEN, et al.,

Defendants,

and

BERNARD C. PARKS, Chief of Los Angeles Police Department,

Defendant-Appellee.

No. 02-56818

D.C. No. CV-01-06400-GAF

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
October 8, 2003 – Pasadena, California

Filed January 20, 2004

Before: Melvin Brunetti, Thomas G. Nelson, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Brunetti

COUNSEL

Stephen Yagman, Esq., Venice, California, for the appellant.

Janet G. Bogigian, DCA, Los Angeles, California, for the appellee.

OPINION

BRUNETTI, Circuit Judge:

David Diaz appeals the district court's dismissal of his complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Diaz brought suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, alleging wrongful conviction and incarceration. The district court determined that Diaz failed sufficiently to plead injury to "business or property" as required to proceed under RICO. We agree and affirm.

FACTS AND PROCEEDINGS BELOW

The facts generally arise from alleged misconduct of various Los Angeles Police Department (LAPD) officers and other officials as part of the LAPD Rampart scandal. According to plaintiff's complaint, on or about July 13, 1998, Los Angeles Police Officers Armando Rodriguiz, Juan Parga, and Jose Ramirez fabricated evidence to the effect that plaintiff had committed assault with a deadly weapon, tampered with witnesses, and conspired to obtain the false conviction of plaintiff. Plaintiff further alleges that these LAPD officers, along with defendant William Eagleson, fabricated additional evidence to cause plaintiff's false conviction, and that all of them caused the kidnapping of plaintiff.

Due to these activities, plaintiff alleges that he was deprived of his ability to earn a living and suffered economic harm; namely, he asserts that, "[a]mong other forms of injury, plaintiff lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated."

Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) based on the contention that Diaz had not sufficiently alleged injury to business or property as required by the RICO statute. The district court agreed and dismissed Diaz's complaint without prejudice and with leave to amend. Diaz opted to stand by his allegations as originally pled and, in turn, allowed the period for amendment to expire. Upon the district court's subsequent dismissal with prejudice, Diaz appealed to this court.

STANDARD OF REVIEW

A district court's order of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). The review is limited to the contents of the complaint, *id.*, although all allegations of material fact in the complaint are taken as true and construed in the light most favorable to plaintiff. *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994). The district court's order of dismissal should be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (quoting

Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). The court may, however, affirm the district court's dismissal for failure to state a claim on any basis supported in the record. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999).

DISCUSSION

RICO provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) (2003). Section 1962, in turn, lists four separate acts which form the basis for RICO liability: (a) to invest income derived from a pattern of racketeering activity in an enterprise; (b) to acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (c) to conduct the affairs of an enterprise through a pattern of racketeering activity; or (d) to conspire to commit any of the above acts. 18 U.S.C. § 1962(a)-(d). A plaintiff must show, therefore, an injury to business or property as well as a violation of one or more of the four acts above to recover under RICO.

RICO is to be construed broadly, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985); however, despite Congress's expansive design, *see United States v. Turkette*, 452 U.S. 576, 586-87 (1981), and express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947, it is well established that not all injuries are compensable under RICO. *See Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992).

To recover under RICO, a plaintiff must demonstrate injury to business or property. A showing of such injury

requires proof of concrete financial loss, not "mere injury to a valuable intangible property interest." *Id.* (quoting *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (refusing to consider cancellation of insurance policy injury to property; *viz*, the loss of "protection . . . afforded against potential financial loss in the future and the present peace of mind that flows from such protection" constituted personal injury, not injury to property)).

Moreover, this and other courts have consistently held that personal injuries are not recoverable under RICO. *Id.* at 785-86 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (dictum); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3rd Cir. 1991) (plaintiffs could not recover medical expenses and emotional distress resulting from their exposure to toxic waste); *Berg*, 915 F.2d at 464 (loss of security and peace of mind due to cancellation of insurance policy were not actionable under RICO); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989) (harassment and intimidation of litigants in an attempt to get them to settle lawsuit could not support RICO claim), *rejected on other grounds by Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992); *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir. 1988) (family of murder victim could not recover under RICO for economic consequences of murder), *cert. denied*, 488 U.S. 981 (1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (damages for physical injury and wrongful death resulting from exposure to toxic waste were not recoverable under RICO)).

Notably, in *Grogan*, cited with approval in both the *Oscar* majority and dissent, the families of murder victims

could not recover under RICO for the economic consequences of their relatives' wrongful deaths. *Grogan*, 835 F.2d at 846-47. The *Grogan* court noted that

> [o]ur task . . . is not to decide whether the economic aspects of damages resulting directly from personal injuries could, as a theoretical matter, be considered injury to "business or property," but rather to determine whether Congress intended the damages that plaintiffs seek in this case to be recoverable under civil RICO.

Id. at 846. Upon considering the appellants' argument that a common-sense interpretation of the words "business or property" necessarily included the economic damages that result from injury to the person, the *Grogan* court concluded, "In our view, the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom." *Id.* at 847; *see also Oscar*, 965 F.2d at 791 (Kleinfeld, Hug, and Brunetti, JJ., dissenting) (discussing *Grogan*: "[M]urder is personal injury, not injury to property, and pecuniary losses flowing from the wrongful death could not transform personal injury into injury to property.").

It is true that some courts have found RICO standing in plaintiffs who alleged lost employment opportunity. The Fifth Circuit found standing in a physician who claimed impairment of his capacity to obtain future employment because his reputation was harmed by his association with RICO defendants. *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 149 (5th Cir. 1997) (categorizing lost expectation of earnings as lost business income), *rev'd on other grounds by Beck v. Prupis*, 529 U.S. 494, 505 (2002). Relying on *Khurana*, a district court found RICO standing in a real estate developer who suffered "injury to

his professional reputation." *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 290 (D.S.C. 1999). Another district court found RICO standing in a plaintiff claiming interference with the opportunity to pursue union employment. *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1101 (D. Mass. 1986).

At first blush, it might appear that Diaz's alleged injury is at least as tangible as that alleged in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), our most recent decision addressing RICO standing. In *Mendoza*, documented farm-workers brought a RICO action alleging that fruit growers had conspired to hire undocumented workers in order to depress wages. *Id.* at 1166. We held that the plaintiffs had alleged sufficient RICO standing to survive a motion to dismiss. "That wages would be lower if, as alleged, the growers relied on a workforce consisting largely of undocumented workers, is a claim at least as plausible enough to survive a motion to dismiss, whatever difficulty might arise in establishing how much lower the wages would be." *Id.* at 1171. Diaz's claim, however, is distinguishable, not because he alleges loss of wages, but because he has not alleged that the wrongdoing was in any way *tied to or directed at* his business or property. *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 258 (1994) ("*NOW*") (RICO defendants who directly target the business of the plaintiff need not have a motive of economic gain). He merely alleges consequential damages.

The plaintiffs in *Mendoza*, *Khurana*, *Sadighi*, and *Hunt* were all targeted by the RICO defendants through their participation in the employment opportunity that was injured by the defendant. In *Mendoza*, for example, the farmworkers were targeted because they were farm-workers and were injured in their farmworking. That is,

they were the most direct victims of a scheme illegally manipulating farmworker wages. *Mendoza*, 301 F.3d at 1169. In *Khurana*, a physician claiming injury to his professional reputation was the victim of a scheme that made improper use of this reputation. *Khurana*, 130 F.3d at 150-51. In *Sadighi*, plaintiff Riggins, also claiming injury to his professional reputation, was targeted in his capacity as a real estate professional when the defendant used a cover letter Riggins wrote in support of a legitimate loan application to support the defendant's fraudulent loan application. *Sadighi*, 36 F. Supp. 2d at 290. In *Hunt*, a union carpenter apprentice claiming injury to her ability to earn union wages was harassed in her status as an apprentice by union officers. *Hunt*, 626 F. Supp. at 1100.

In the case at bar, Diaz does not allege that he was targeted in his capacity as an employee or businessperson. His allegation of loss of employment, like an allegation of pain and suffering or an allegation of medical expenses incurred, is simply an allegation that he sustained damage as a consequence of the conduct of which he complains. He has not alleged a sufficient nexus between the RICO act and his "business or property."

Diaz alleges only that he "lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that plaintiff was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." Diaz alleges no out-of-pocket expenses resulting from the wrongful acts of the LAPD officers or other defendants. At most, Diaz's alleged injuries could be characterized as "mere injury to a valuable intangible property interest" in his right to pursue employment. *See Oscar*, 965 F.2d at

785; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (whether a particular interest in considered property is usually a matter of state law); *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 31 (1916) (holding that "right of a citizen to pursue any calling, business, or profession he may choose is a property right . . . "). Nonetheless, such injury is insufficient to satisfy RICO's standing requirement. *See Oscar*, 965 F.2d at 785 & n.1 (citing *Berg*, 915 F.2d at 464); *see also Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 669 (S.D. Cal. 1994) (citing *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992)) ("[T]he Court will not adopt a state interpretation of 'property' that will contravene Congress' intent in enacting RICO.").

Further, much like the plaintiffs in *Grogan*, who pled economic losses stemming from the wrongful death of their relatives, Diaz ultimately alleges injury to his person resulting from his wrongful conviction and incarceration. Losing employment and employment opportunities from false imprisonment is no different than losing such employment opportunities from a wrongful death; the plaintiff in each action incurred some form of personal injury and, in turn, suffered economic injuries therefrom. The *Grogan* court specifically rejected the notion that the pecuniary and non-pecuniary aspects of personal injury claims may be separated for purposes of RICO; rather the court noted that economic consequences and personal injuries are often intertwined and therefore concluded that "pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property.'" *Grogan*, 835 F.2d at 847. Indeed, it reasoned, "[t]hat Congress intended to create a federal treble damages remedy for cases involving bodily

injury, injury to reputation, mental or emotional anguish, or the like, *all of which will cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language." *Id.* (citation omitted) (emphasis added by the *Grogan* court).

Diaz asserts that the Supreme Court decision in *NOW* saves his claim for loss of employment opportunities, as the Court in that case held that the plaintiffs' allegations that abortion protesters had used "threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics" constituted sufficient injury to business or property to proceed under RICO. *NOW*, 510 U.S. at 253 (quoting Second Amended Complaint ¶ 97). Diaz's argument is unavailing, however. The plaintiffs in *NOW* alleging violations of RICO consisted only of two abortion clinics who complained of harm to their businesses from the protesters' alleged racketeering activities as well as cited losses and harm to their employees, doctors, and patients. Whether the employees, doctors, and patients could withstand a Rule 12(b)(6) dismissal motion if bringing suit on their own behalf was beyond the scope of the *NOW* decision; the Court simply held that the two clinics had sufficiently established standing to sue under RICO. Diaz's injuries do not resemble those averred in *NOW*. While the *NOW* plaintiffs alleged harm to their respective clinic businesses, Diaz's complaint speaks only of personal harm and pecuniary losses stemming therefrom. This type of injury is not the sort Congress sought to redress in enacting RICO. *See Grogan*, 835 F.2d at 847.

Because Diaz failed to allege injury to "business or property," he lacks standing to bring a claim under RICO.

Therefore, the district court correctly dismissed his claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court's order of dismissal is AFFIRMED.

AFFIRMED.

95 Cal.App.4th 695; 115 Cal.Rptr.2d 799 [Jan. 2002]

[No. B137926. Second Dist., Div. Three. Jan. 28, 2002.]

THE PEOPLE, Plaintiff and Respondent, v.
DAVID ANGEL DIAZ, Defendant and Appellant.

COUNSEL

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KLEIN, P. J. – Defendant and appellant, David Angel Diaz, appeals from the judgment entered following his conviction, by jury trial, for attempted murder, aggravated mayhem, assault by means likely to produce great bodily injury, and assault with a semiautomatic weapon, with enhancements for discharging a firearm causing great bodily injury, firearm use and infliction of great bodily injury (Pen. Code, §§ 664, 187, 205, 245, subd. (a)(1), 245, subd. (b), 12022.53, subd. (d), 12022.5, 12022.7).[1] Sentenced to a state prison term of 37 years to life, Diaz contends there was trial and sentencing error.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23, 864 P.2d 103]), the evidence established the following.

1. *Prosecution evidence.*

K.P. and defendant Diaz were members of the Eastlake Gang. The Eastlake Gang and the Clover Gang, bitter rivals, were at war. On the night of July 14, 1998, K.P. was driving in his car with his girlfriend, Jeanette V. K.P. saw Diaz in the street and picked him up. Neither K.P. nor Jeanette knew Diaz had a gun.

Remberto P., a member of the Clover Gang, was walking across the intersection of Griffin Avenue and Manitou Street with his girlfriend, Martha S., and her 13-year-old brother. When K.P. came to a stop sign at the intersection of Griffin and Manitou, Diaz got out of the car saying something like, "I am going to waste him," or "I am going to blast him." Diaz walked up to Remberto and asked, "Where are you from?" Remberto knew Diaz was asking what gang he was from and he replied, "I am from Clover." Diaz pulled out a handgun, shot at Remberto numerous times, and then got back into K.P.'s car. Remberto was hit twice in the leg, the bullets destroying the femoral artery of his lower leg and shattering his fibula.

K.P. drove to the home of Diaz's girlfriend, Juana C., and parked at the rear of the property. K.P., Jeanette, and Diaz got out of the car. K.P. and Jeanette walked away

together, and Diaz walked away in a different direction. K.P. and Jeanette retrieved the car early the next morning.

Police Officer Armando Rodriguez responded to the scene and spoke with Remberto's girlfriend, Martha. Martha told Rodriguez she recognized the gunman, whom she knew by his moniker "Drifter," and that Drifter was a member of the Eastlake Gang. Officer Juan Parga spoke to Martha a little later that same night. Martha told Parga she knew the gunman from high school, that his name was David, that he was also known as Drifter, and that he was from the Eastlake Gang. Martha identified a photograph of Diaz as the gunman.

Officer Jose Ramirez interviewed Martha about a week after the shooting. Martha told him she knew the person who shot Remberto, and that she had gone to junior high school and high school with the gunman. Martha showed Ramirez an eighth grade yearbook and pointed out a photograph of Diaz.

2. *Defense evidence.*

Diaz's sister testified that she, Diaz and his girlfriend Juana were at the movies on the night Remberto was shot.

Juana's father testified he was cleaning up his backyard sometime after 9:00 p.m. on July 14, 1998, when a small car crashed into his garage. A girl and a Chinese man got out of the car. The man pulled up his shirt and displayed a gun. Then the two of them jumped over the back fence. Juana's mother, who was inside the house, looked out the window when she heard the crash and she saw Jeanette and a man get out of the car.

CONTENTIONS

1. The trial court erred by discharging a juror during deliberations.

2. The trial court erred by admitting the preliminary hearing testimony of a putatively unavailable witness.

3. The concurrent sentences on counts 2, 3 and 4 violate section 654.

DISCUSSION

1. *Discharged juror.*

(1) Diaz contends the trial court erred by discharging one of the jurors during deliberations. This claim is meritless.

Section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." "We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror "'must appear in the record as a demonstrable reality.'" [Citation.]' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474 [106 Cal.Rptr.2d 313, 21 P.3d 1225].)

After only two hours of deliberation, the foreperson of Diaz's jury sent the trial court a note saying, "A juror refuses to deliberate further. We believe that this violates instruction number 17.41.1. We want further guidance from the court." Commenting that it wanted to find out "whether it is an honest difference of opinion or whether or

not there is, in fact, a juror who is not deliberating," the trial judge had the jury foreperson, Juror No. 9, brought into the courtroom. The foreperson said Juror No. 5 was "intimidated by us needing to discuss her opinion and ours and she just feels ganged up on because she is by herself," and that "her position and her attitude is, this is how I feel, and there is nothing to discuss." Although Juror No. 5 had initially participated in deliberations, she subsequently began refusing to discuss anything, saying only, "This is how I feel." "[E]verything was going fine until like the last 10 or 15 minutes when we realized that this is where we all were positioned. . . . [B]ut, when we had the difference, there was no discussing it further. 'This is how I feel.'" "We tried, like, two or three times to encourage her. And everybody calmed down and backed off and just tried to ease the situation and then approach it again, and it was just – that's it." "When the other jurors told her they weren't ganging up on her and not to take it personally, Juror No. 5 said she feels like it is [personal]. She is completely intimidated. . . ."

The trial court indicated it wanted to question Juror No. 5, and counsel did not object. The trial court asked Juror No. 5. if she was having difficulty in the jury room. She said, "I think I am," and began to cry. She said she had been discussing her opinion and the factual basis for it with the other jurors, "[b]ut they are . . . all bombarding me and I am just telling them the way that my belief –." Pointing out that deliberations had only been going on for about two hours (after a two-week trial), the court reminded her to "decide the case for yourself, but you should do so only after discussing the evidence and the instructions with the other jurors," and that "it is rarely helpful for a juror at the beginning of deliberation to express an

emphatic opinion on the case or to announce a determination to stand for a certain verdict."

The trial court then had Juror No. 11 brought into the courtroom. Juror No. 11 said that although Juror No. 5 had initially participated in deliberations, she stopped doing so and now refused to discuss the evidence. When the other jurors asked Juror No. 5 to discuss her position, she refused, saying: "That's it. I am not going to discuss it any more." She complained the other jurors were "ganging up" on her. The trial court brought in Juror No. 1, who said Juror No. 5 had initially deliberated, but then stopped because she felt the other jurors were attacking her. "The Court: Okay. When you ask her to discuss the case or the facts, what does she say? [¶] Juror No. 1: 'You are all attacking me.' [¶] The Court: Is it your perception that, in fact, Juror No. 5 is being attacked? [¶] Juror No. 1: No. [¶] The Court: Okay. Tell me why not. [¶] Juror No. 1: We have asked that she explain her thoughts and why she feels that way, and perhaps we could then understand the reason why she is feeling the way she is feeling."

The trial court had all the jurors and alternates brought in for a rereading of the instructions relating to juror duties, and then excused them for the day. The next morning, the court indicated it felt further questioning of Juror No. 5 was necessary to determine if she was either refusing to deliberate or incapable of deliberating because she felt intimidated. Juror No. 5 was brought in and the trial court asked: "Yesterday you said you felt intimidated by the other jurors and, in fact, it was something that brought you to tears. [¶] Do you still feel intimidated by the other jurors?" She said, "No, your Honor. I was going through a lot. My brother-in-law was very sick and he died yesterday." She then said, "It has been kind of hard for me,

but I am doing better now, your Honor." When the trial court asked if this personal loss wouldn't make it hard for her to deliberate because "[i]t sounded like yesterday that interfered with it," she replied, "Well, I didn't know that he had died until I got home." She said her brother-in-law's illness had been bothering her the day before, but when the trial court asked if she thought that was why she had been having problems in the jury room, she said: "No. There was a lot of problems in there. But, I think I can do my job, your Honor. [¶] The Court: Okay. What has changed to make you think so? [¶] Juror No. 5: I made up my mind that I am a juror and I have to do my job and, like you told me, weigh the evidence, and I am going to do my job." Asked if her brother-in-law's death wouldn't affect her, she said: "No, your Honor, because he is not suffering anymore. He was suffering a lot; he had bilateral kidney failure and he was on the machine. So he is not suffering any more." When the trial court asked what had changed since the day before to make her feel she was not going to be intimidated anymore, Juror No. 5 replied: "Because I have got a lot of prayer and I know the Lord will bring me through. Your Honor, that's how I feel. That's my belief."

The trial court indicated to counsel it felt that Juror No. 5's answers had raised questions about her "candor and reliability" because, during the previous day's questioning, she hadn't said anything about her brother-in-law's illness. "She said she was intimidated by the others. And she said that in that case she hadn't discussed the case with [the] others, and yesterday she said nothing about the fact that her brother-in-law was near death and that was prohibiting her from being able to make a determination in regards to this case – " "[I]t almost seems to me that there is good cause on just a number of levels.

First of all, the juror has lied about what was a problem for her. First she said it was intimidating, and then she says she is emotionally upset because her brother-in-law was near d[illegible]. Then she finds out overnight that he has, in fact, pas[illegible] away. And I question whether or not that death . . . isn't going to continue to interfere with her ability to make decisions in this case, in light of what happened yesterday, and how she wasn't forthcoming." The trial court noted the three jurors examined had all "indicated that [Juror No. 5] did fail to perform her duty to deliberate. All of the jurors indicated that she talked for a while and then stopped, and refused to talk anymore with the other jurors." The trial court concluded: "I have had an opportunity to observe all . . . four jurors that I have made inquiry of and see their facial expressions, the tone and manner of the way that they discussed things. And it's my call that I think that Juror No. 5 is emotionally distraught and couldn't say it yesterday, and still looked emotionally distraught today, and I find it difficult that she didn't fully disclose, and I do find there is good cause under those three situations: failure to deliberate, the fact of feeling intimidated, and also the fact that apparently her mind wanders and makes her recalcitrant to deliberate when she feels someone is in ill health by her admission today. [¶] So, . . . I am going to determine that there is good cause to excuse Juror No. 5."

Responding to a subsequent new trial motion, the trial court amplified its explanation. The court noted that all three of the other jurors examined agreed "that after a relatively short period, be it an hour or two hours, after a 10-day trial, that [Juror No. 5] was no longer taking part in the decisions – or discussing the facts of [the] case. [¶] And when she was first confronted with that decision, she

said that she was deliberating, although she felt intimidated, and that she was trying to do that. But the next day she basically comes in and contradicts her story and says that . . . the difficulty in her deliberations yesterday [was] due to the fact that she was upset, and understandably so, at the life-threatening illness that she had been worried about with her brother-in-law. [¶] And so, that wasn't disclosed the first day. . . . " "[B]asically my decision was made on the failure to deliberate, failure to be honest about what was taking place, her feeling intimidated, and the difficulties that one would reasonably have as a result of that."

Refusal to deliberate constitutes good cause for removal. "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) "[W]e adhere to the established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. [Citations.]" (*Id.* at p.

484.) In addition, both trial-related and non-trial-related stress can provide good cause for discharging a juror. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1099-1100 [31 Cal.Rptr.2d 321, 875 P.2d 36] [anxiety about new job]; *People v. Collins* (1976) 17 Cal.3d 687, 696 [131 Cal.Rptr. 782, 552 P.2d 742] [juror said she could not decide case "on the evidence and the law since she was involved emotionally more than intellectually," "that she could not follow the court's instructions, [and] that she had been upset throughout the trial"]; *People v. Warren* (1986) 176 Cal.App.3d 324, 326-327 [221 Cal.Rptr. 768] [juror said she was so intimidated by other jurors she was likely to vote with majority and against her own conscience]; see also *In re Mendes* (1979) 23 Cal.3d 847, 852 [153 Cal.Rptr. 831, 592 P.2d 318] [trial court properly granted juror's pretrial request to be excused on assumption her "normal grief" over brother's sudden death "would make it exceedingly difficult for [her] to concentrate"].)

Diaz argues Juror No. 5 was not refusing to deliberate, but that – having properly deliberated and reached a decision – she was simply holding out against a guilty verdict. Diaz argues that in these circumstances the removal of Juror No. 5 was improper under *People v. Castorena* (1996) 47 Cal.App.4th 1051 [55 Cal.Rptr.2d 151]. However, there is little similarity between the two cases. The trial court in *Castorena* never questioned the removed juror, even after she wrote a letter alleging she had been properly deliberating and that the misconduct had been perpetrated by a different juror. *Castorena* held it had been an abuse of discretion to remove this juror because, without inquiring into her allegations, the trial court "did not have the requisite facts upon which to decide whether [the removed juror had] in fact failed to

carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the removed juror's] legitimate disagreement with the other jurors." (*Id.* at p. 1066.) Here, the trial court did inquire into the alleged misconduct before acting. The *Castorena* jury had already been deliberating for *days* when the issue of juror misconduct arose, whereas Diaz's jury had been deliberating for at most *two hours*. Moreover, Juror No. 5's own statement to the trial court the second time she was examined – when she said, "I made up my mind that I am a juror and I have to do my job and . . . weigh the evidence, and I am going to do my job" – demonstrates she had not been deliberating the day before and, therefore, that she could not have been a legitimate holdout juror.

Diaz also relies on *People v. Delamora* (1996) 48 Cal.App.4th 1850 [56 Cal.Rptr.2d 382], where the trial court removed two jurors who had expressed concerns about not being compensated by their employers if they spent too much time on jury duty. The Court of Appeal found an abuse of discretion, not because problems relating to a juror's employment may not provide a basis for a proper discharge, but because it was unclear whether there was actually such a problem in the case. The trial court had removed the two jurors – after they had been deliberating for more than three days – without first asking if they were willing to deliberate longer even if their employers would not pay them. "Although a trial court does not abuse its discretion when it discharges a juror because of problems related to the juror's employment, the employment problem must be real and not imagined." (*Id.* at p. 1855.) *Delamora* is inapposite because

Juror No. 5 was not discharged until after the trial court questioned her.

Juror No. 5's demeanor and responses when initially questioned by the trial court revealed that she was extremely upset. Her responses to the next day's follow-up questioning demonstrated that her distress had caused her to stop deliberating, and revealed a troubling equivocation as to why she had been distressed. The trial court was entitled to discount Juror No. 5's verbal declarations when they conflicted with her demeanor. (See *People v. Lucas* (1995) 12 Cal.4th 415, 489 [48 Cal.Rptr.2d 525, 907 P.2d 373] ["Although the juror stated the cancellation of her vacation would not affect the discharge of her duties as a juror, her behavior and demeanor supplied substantial evidence to the contrary. She had repeatedly brought the problem of the vacation to the court's attention, exhibiting concern and agitation over it. The court determined that the juror's demeanor indicated her ability to deliberate fairly would be substantially impaired if the penalty trial caused her to cancel her vacation."]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [39 Cal.Rptr.2d 607, 891 P.2d 153] [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [16 Cal.Rptr.2d 47] [trial court properly removed juror because his evasions under questioning led court to conclude he had violated order not to discuss case and lacked ability to follow instructions, keep open mind, and be objective].)

Finally, we cannot agree with Diaz that the recent *Cleveland* decision demonstrates the trial court erred. In *Cleveland*, the record failed to establish a refusal to deliberate as a demonstrable reality because "it became apparent under questioning that the juror simply viewed

the evidence differently from the way the rest of the jury viewed it." (*People v. Cleveland, supra*, 25 Cal.4th at p. 486.) "It is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors. [¶] Under these circumstances, we conclude that the trial court abused its discretion in excusing Juror No. 1." (*Ibid.*)

Here, on the other hand, the initial questioning of Juror No. 5 revealed that she might indeed be refusing to deliberate because she felt intimidated by the other jurors, even though she insisted she had been deliberating properly. When the trial court examined her the next day, however, Juror No. 5 gave several different stories. First she seemed to blame her emotional distress the day before on her brother-in-law's death. Then she conceded it hadn't been the death which upset her (because she didn't learn of it until that night), but that it had been her brother-in-law's illness. Based on its observation of Juror No. 5's demeanor, the trial court concluded she had not been truthful the day before and that her ability to deliberate was being inhibited by something (either emotional upset caused by her brother-in-law's illness, or intimidation by the other jurors, or a combination of both). And as noted above, Juror No. 5's own statements revealed that she had simply stopped deliberating on the first day. Thus, substantial evidence exists to support the trial court's conclusion that Juror No. 5 was not merely viewing the evidence differently from the other jurors; rather, she was having

problems deliberating and she had not been candid about it. In these circumstances, the trial court did not abuse its discretion by discharging her.[2]

2. *Unavailable witness.*

(2a) Diaz contends the trial court erred by admitting Martha S.'s preliminary hearing testimony under Evidence Code section 1291 (former testimony of unavailable witness) because the prosecution failed to show diligent efforts had been made to s cure her attendance at trial. This claim is meritless.

(3) Under Evidence Code section 240, subdivision (a)(3), a person is "unavailable as a witness" within the meaning of Evidence Code section 1291 if she is absent and the proponent of her statement, although exercising due diligence, has been unable to secure her attendance at trial. The proponent of the evidence has the burden of establishing unavailability. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1297 [18 Cal.Rptr.2d 796, 850 P.2d 1].) An appellate court "will not reverse a trial court's determination [under § 240] simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts 'unreasonable.' [Citations.] The law requires only reasonable efforts, not

[2] We also hold the trial court did not err by denying Diaz's new trial motion based on the claim Juror No. 5 had been improperly discharged.

prescient perfection." (*People v. McElroy* (1989) 208 Cal.App.3d 1415, 1428 [256 Cal.Rptr. 853], disapproved on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 900, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243].) "That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence]. . . . It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1298.) A court cannot "properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (*People v. Hovey* (1988) 44 Cal.3d 543, 564 [244 Cal.Rptr. 121, 749 P.2d 776].)

The Supreme Court has recently resolved the proper appellate standard of review for this issue, ruling that it is independent review. (*People v. Cromer*, *supra*, 24 Cal.4th at pp. 892-893 [in "evaluating a trial court's due diligence determination" the appellate court's "proper standard is independent, de novo, review rather than the more deferential abuse of discretion test"].) **(2b)** Under this standard of review, the trial court properly admitted Martha's preliminary hearing testimony. Diaz argues the police took a calculated risk Martha would be unavailable for trial when they did not try to subpoena her until just before the trial started, and that the prosecution should, therefore, have been charged with the consequences. However, we conclude not only that the prosecution demonstrated due diligence in trying to secure her presence at trial, but also

that it is fairly clear Martha purposely made herself unavailable because she was unwilling to testify.

At the due diligence hearing, Officer Jose Ramirez testified he made more than five attempts to personally serve Martha with the subpoena at the beginning of the trial. He spoke to her mother, who said she had no information. He went to schools Martha had attended, but he got no leads. He asked patrol officers on all three shifts to look for Martha, but they were unable to find her. In his presence, the victim made telephone calls to Martha's mother and brother. According to the brother, Martha knew the police were looking for her and she was determined not to testify. Ramirez checked with local hospitals and the Department of Motor Vehicles. He checked to see if Martha had been arrested recently.

Detective William Eagleson was one of the investigating officers. He testified that on September 23, 1998, he picked Martha up at her mother's house (where she was living), falsely told her he wanted to talk to her at the police station, and instead took her to the courthouse to testify at the preliminary hearing. Eagleson said this was the only way he could have gotten her to come to court. Martha had told him she didn't want to testify. She was very fearful because this was a gang case and her brothers were well-known members of the Clover Gang. Eagleson testified he knew Martha would be staying at her mother's house after the preliminary hearing because Martha was pregnant. Eagleson had extensive experience in gang-related investigations. In his professional opinion, serving a subpoena on Martha well in advance of trial would have only ensured her unavailability. After the preliminary hearing, Eagleson monitored Martha's whereabouts on a weekly basis. He knew the area where she lived and he

talked to people there who said Martha was still living with her mother. Eagleson himself occasionally saw Martha around the neighborhood. Based on his general experience in gang cases, and on his specific experience with Martha, Eagleson's tactic would have been to subpoena her at the same time that he actually went to pick her up to bring her to court to testify. Giving Martha advance warning would merely ensure that she would leave the area that day to avoid testifying.

In light of this testimony, we agree with the trial court's conclusion that, "given the particular circumstances of this case, . . . the witness is actually making a calculated effort to avoid service of process. And therefore, the detective's decision to – how he decided to serve the subpoena, if he could have, certainly appears reasonable under the circumstances, given his personal knowledge of the witness. [¶] So, given my best judgment and reasoning, . . . under the totality of the circumstances, it does appear . . . that due diligence has been made." There was no error in admitting Martha's preliminary hearing testimony.[3]

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[3] We also conclude the trial court did not err by denying Diaz's new trial motion, alleging newly discovered evidence, based on testimony from Martha S. that she was available for trial and would have testified Diaz was not the gunman. The trial court reasonably concluded Martha's new testimony was cumulative because it replicated her preliminary hearing testimony, during which she refused to identify Diaz and did her best to disavow the statements she had made to police at the time of the shooting identifying him as the gunman.

3. *Section 654 violation.*

(4) Diaz contends the trial court erred by not staying the sentences on counts 2, 3 and 4. This claim has merit.

The trial court sentenced Diaz to state prison for 37 years to life on his conviction for attempted murder under count 1 of the information. The trial court also sentenced him to 25 years to life on the aggravated mayhem conviction under count 2; six years on the aggravated assault conviction under count 3; and seven years on the aggravated assault conviction under count 4. The trial court then ordered the sentences on counts 2, 3 and 4 to run concurrently with the sentence on count 1.

Diaz argues, and the Attorney General concedes, that the concurrent sentences on counts 2, 3 and 4 should have been stayed pursuant to section 654 because those counts all involved charges based on the same single act of shooting a single victim.

We agree. Diaz's concurrent prison sentence on counts 2, 3 and 4 must be stayed so long as the judgment on count 1 remains in full force and effect. (See *People v. Robinson* (1991) 226 Cal.App.3d 1581, 1587 [277 Cal.Rptr. 504]; *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547-548 [88 Cal.Rptr. 235].)

DISPOSITION

The concurrent sentences on counts 2, 3 and 4 are hereby ordered stayed. As modified, the judgment is affirmed.

Kitching, J., and Aldrich, J., concurred.

A petition for a rehearing was denied February 22, 2002, and appellant's petition for review by the Supreme Court was denied April 17, 2002.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID DIAZ, Plaintiff, v. DARYL F. GATES, et al. Defendants.	NO. CV 01-06400 GAF (AJWx) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** (Filed Aug. 6, 2002)

I.

INTRODUCTION

Asserting two claims for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), Plaintiff David Diaz ("Plaintiff") alleges that several Los Angeles Police Department ("LAPD") Officers falsely arrested him and framed him for a crime he did not commit. Presently before the Court is Defendant Bernard Parks' ("Defendant") motion to dismiss.

Defendant Parks contends that because Plaintiff has failed to plead several necessary elements of a RICO claim, Plaintiff's RICO claims must be dismissed for failure to state a claim upon which relief can be granted.

Because the Court finds that Plaintiff does not allege an injury to "business or property" within the meaning of RICO, Plaintiff's complaint must be dismissed. Accordingly, Plaintiff's complaint is **DISMISSED WITHOUT PREJUDICE**.

II.

FACTUAL BACKGROUND

Plaintiff alleges that various LAPD Officer Defendants fabricated evidence, tampered with witnesses to obtain an assault with a deadly a deadly weapon conviction, and therefore, contributed to Plaintiff's allegedly wrongful conviction, and subsequent incarceration. (Complaint ¶16). Plaintiff asserts that as a result of his conviction and incarceration, he has been deprived of his ability to earn a living and has suffered economic harm. (*Id.* ¶17). Plaintiff's conviction has not been overturned, but because his claims are pled pursuant to RICO, rather than 42 U.S.C. § 1983, his claims are not foreclosed by *Heck v. Humphrey,* 512 U.S. 477 (1994). *See Hunter v. Gates,* 99-CV-12811 GAF, 2001 WL 837697, *2 (C.D. Cal. April 16, 2001) (where this Court held that *Heck*'s reasoning does not apply to civil RICO claims).

III.

ANALYSIS

A. Legal Standard for Evaluating Motions to Dismiss Under Fed.R.Civ.P. 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Generally, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal

theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990).

In evaluating a motion to dismiss, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Barron v. Reich,* 13 F.3d 1370, 1374 (9th Cir. 1994); *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898. The court is not, however, required to accept "legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994).

A RICO claim will be dismissed if the plaintiff fails to set forth factual allegations supporting each element of the alleged violation. *Miranda v. Ponce Fed. Bank,* 948 F.2d 41, 44 ("[T]o avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state *facts* sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.") (emphasis added); *Jennings v. Emry,* 910 F.2d 1434, 1435 (7th Cir. 1990) (same); *cf. Balistreri,* 901 F.2d at 699 (dismissal is appropriate where insufficient facts are pled to support a cognizable legal theory).

Where a motion to dismiss is granted, a district court should grant leave to amend unless it is clear that the complaint cannot be saved by any amendment. *Chang v. Chen,* 80 F.3d 1293, 1296 (9th Cir. 1996); *Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995).

B. Elements of a Civil RICO Claim

RICO grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962, in turn, contains four subsections which make it unlawful to: (a) invest income derived from a pattern of racketeering activity in an enterprise; (b) acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (c) conduct the affairs of an enterprise through a pattern of racketeering activity; or (d) conspire to commit any of the above acts. 18 U.S.C. § 1962(a)-(d). Thus, to state a claim for a civil RICO violation, a private plaintiff must allege facts showing (1) an injury to business or property and (2) a substantive violation of one or more subsections of section 1962.

1. Injury to Business or Property

RICO does not afford a civil remedy for all injuries caused by unlawful racketeering activity; only injuries to "business or property" are actionable. 18 U.S.C. § 1964(c). This limitation excludes recovery for personal injuries. *Oscar v. Univ. Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 1020 (1992) ("[P]ersonal injuries are not compensable under RICO.")[1]; *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990).[2] In addition, in the Ninth Circuit, "injuries to

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[1] Although three judges dissented from the judgment in *Oscar*, they too agreed that personal injuries are not compensable under RICO. *See Oscar*, 965 F.2d at 789 (Kleinfeld, J., dissenting).

[2] The Ninth Circuit's position is in accord with every other Circuit that has confronted this issue, except, perhaps, the Fifth Circuit. *Compare Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143

(Continued on following page)

property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar,* 965 F.2d at 785 (plaintiffs failed to allege any pecuniary injury to their interest in rental property caused by alleged acts of

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(5th Cir. 1997) (allowing claims based on injury to reputation), *vacated, Teel v. Khurana,* 525 U.S. 979 (1998), with *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999) (Plaintiffs who alleged only injury to reputation lacked standing to sue under RICO because damage to reputation is generally considered personal injury, not an injury to "business or property"); *Bast v. Cohen, Dunn & Sinclair, PC,* 59 F.3d 492, 495 (4th Cir. 1995) ("An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property.'"); *Libertad v. Welch,* 53 F.3d 428, 437 (1st Cir. 1995) (Women who sought services at blockaded abortion clinics lacked standing to assert RICO claims against anti-abortion groups that blockaded those clinics because neither woman suffered any injury to business or property); *Doe v. Roe,* 958 F.2d 763, 767 (7th Cir. 1992) ("The terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom."); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918-19 (3rd Cir. 1991) (RICO plaintiffs may not recover damages for physical and emotional injuries due to harmful exposure to toxic waste); *Grogan v. Platt,* 835 F.2d 844, 846 (11th Cir.), *cert. denied,* 488 U.S. 981 (1988) (Stating "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom" and holding that RICO does not permit recovery for economic aspects of personal injuries inflicted by predicate act of murder); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (Rejecting argument that injuries to business or property include all pecuniary injuries caused by a substantive RICO violation and upholding dismissal of RICO claim by plaintiffs exposed to toxic chemicals).

The Ninth Circuit's position also finds support in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), in which the Supreme Court construed a similar restriction in the Clayton Act and stated that "[t]he phrase 'business or property' . . . retains restrictive significance. It would, for example, exclude personal injuries. . . ." *Id.* at 339; *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (Marshall, J., dissenting) (RICO "permits recovery only for injury to business or property. It, therefore, excludes recovery for personal injuries.").

racketeering); *Berg*, 915 F.2d at 464 (plaintiffs who had incurred no actual expenses as a result of cancellation of insurance policies lacked standing to sue under RICO); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) (affirming dismissal of RICO claim where it was impossible to determine from the complaint whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits).

The Supreme Court has described RICO's injury requirement as an issue of standing. *See Sedima*, 473 U.S. at 496. Whether a plaintiff has alleged an injury to business or property giving rise to standing under RICO is a question of law for the court to determine and may properly be raised on a motion to dismiss. *See Oscar*, 965 F.2d at 785 (upholding dismissal of complaint for failure to allege an injury to property).

Plaintiff claims that he has pled a cognizable injury to his business or property by alleging that he suffered "lost employment, employment opportunities, and the wages and other compensation associated with said employment and opportunities . . . [because he was] unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated." (Compliant [sic] ¶31).

To demonstrate injury for RICO purposes, a plaintiff must show proof of concrete financial loss and not mere injury to a valuable property interest. *See Oscar*, 965 F.2d at 785. Personal injuries are not compensable under RICO. *Id.* Here, all of the injuries alleged by Plaintiff flow directly from his false arrest and imprisonment. False arrest and false imprisonment constitute injury to the

person, not to business or property. *See Owens v. Okure*, 488 U.S. 235, 251 (1989) (claims under 42 U.S.C. § 1983, including those based on false arrest, are subject to a states' general or residual statute of limitations for personal injuries); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) ("Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract."); *Black's Law Dictionary* 790 (7th ed. 1999) (defining "personal injury" as, *inter alia*, "[a]ny invasion of a personal right, including mental suffering and false imprisonment."). That Plaintiff suffered some secondary financial losses flowing from his personal injuries does not transform his losses into injuries to business or property.

Two cases cited with approval by the Ninth Circuit in *Oscar* confirm this Court's conclusion that the terms "business and property" are words of limitation which preclude recovery for personal injuries and any consequential pecuniary losses. *See Oscar*, 965 F.2d at 786, 788 *(citing Doe*, 958 F.2d at 770); *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir.), *cert. denied*, 488 U.S. 981 (1988)); *see also id.* at 791, 795 (Kleinfeld, J., dissenting). In *Grogan*, the Eleventh Circuit held that six FBI agents who were injured in a gun battle with suspects and the estates of two other agents who were killed during the shootout did not have standing under RICO to sue the estates of the men who shot them. *See* 835 F.2d at 846-47. The *Grogan* plaintiffs maintained that the quantifiable economic consequences of their personal injuries, including lost wages and employment, constituted injuries to business and property within the meaning of RICO, even if they could not recover under RICO for some of the traditional

categories of personal injury damages, such as mental anguish. *See id.* The Eleventh Circuit rejected this argument concluding that "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, *including pecuniary losses therefrom*." *Id.* at 847 (emphasis added).

Similarly, in *Doe*, the Seventh Circuit rejected the idea that any financial loss, no matter what its source, constitutes a business or property injury within the meaning of RICO. *See* 958 F.2d at 770. "Most personal injuries . . . entail some pecuniary consequences[,]" but where such losses are incurred as a result of purely personal injuries, they do not constitute injuries to business or property within the meaning of RICO. *Id.* at 770.

Admittedly, placing recovery for pecuniary losses associated with personal injuries outside the scope of civil RICO renders victims of RICO predicates, such as murder and kidnapping, unable to use it as a vehicle for redress. But in such cases, plaintiffs will rarely be without any remedy – a consideration which undoubtedly influenced Congress's decision to place personal injury claims beyond RICO's reach. As noted by the *Grogan* court,

> [h]ad Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language.

Grogan, 835 F.2d at 847 (*quoting Morrison v. Syntex Labs.*, 101 F.R.D. 743, 744 (D.D.C. 1984) (emphasis in *Grogan*)).

Plaintiff mistakenly relies on *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249 (1994), to support his contention that denial of the opportunity to engage in employment is necessarily a viable injury for RICO purposes. (Opp. 8-10). However, *Scheidler* does not obviate the requirement that the injury be concrete and quantifiable. Rather, it stands for the proposition that RICO does not require that either the racketeering enterprise, or the predicate acts of racketeering, be motivated by economic purposes. *See id.* at 250-252, 262. Of course, whether pecuniary gain motivated the use or creation of a particular enterprise or the commission of particular predicate acts is not an issue presently before the Court.

Finally, even if the Court were to focus solely on the nature of the damages Plaintiff sustained, rather than on the nature of the injury inflicted, Plaintiff's losses still would not qualify as compensable injuries. "'[P]roperty' comprehends anything of material value owned or possessed." *Reiter,* 442 U.S. at 338; *cf.* Cal. Civ. Code § 654 ("In this Code, the thing of which there may be ownership is called property."). Under California law, the loss of employment generally is not considered an injury to property.[3] *See Barton v. New United Motor Mfg. Inc.,* 43 Cal. App. 4th 1200, 1207 (1996) (claim for termination in violation of public policy is a claim for personal injuries,

[3] Courts evaluating RICO claims have generally looked to state law to determine whether a particular claim constitutes an injury to property. *See, e.g., DeMauro v. DeMauro,* 115 F.3d 94, 96 (1st Cir. 1997); *Doe,* 958 F.2d at 768; *Leach v. F.D.I.C.,* 860 F.2d 1266, 1274 n.14 (5th Cir. 1988); *cf. Oscar,* 965 F.2d at 786 (describing the plaintiff's property interest as a "leasehold," a definition supplied by California law).

not claim for violations of property right).[4] Nor can Plaintiff's claimed "employment opportunity" losses be characterized as the kind of tangible financial loss to a business recoverable under RICO. *See, e.g., Grogan,* 835 F.2d at 848; *Oscar,* 965 F.2d at 785.

2. Substantive Violation

To state a RICO claim under section 1964(c), a private plaintiff must not only demonstrate standing, but must also adequately allege a substantive violation of one of section 1962's four subsections.

This Court already has addressed the pleading requirements for civil RICO claims at some length in a number of Rampart-related cases. *See, e.g.,* June 29, 2001 Order in *Serrano v. City of Los Angeles, et al.,* (case no. 00-CV-11597) (attached hereto as Exhibit A). The operative complaint in this case suffers from many of the same deficiencies previously identified by the Court in the *Serrano* Order. For efficiency's sake, the Court will not repeat these pleading requirements in full in this order. Instead, the Court incorporates the attached Order in this Order. Plaintiff is advised to review the *Serrano* Order for a fuller statement of the Court's reasoning for dismissing these claims and for the standards necessary to plead a viable RICO claim.

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[4] Examples of compensable injuries include the theft or destruction of personal property. *See, e.g., Northeast Women's Ctr., Inc. v. McMonagle,* 868 F.2d 1342, 1349 (3rd Cir.), *cert. denied,* 493 U.S. 901 (1989) (destruction of plaintiff's medical equipment constituted injury to property); *Gitterman v. Vitoulis,* 564 F. Supp. 46, 48-49 (S.D.N.Y. 1982) (allegation that defendants stole jewelry from plaintiff's home sufficient to state claim under RICO).

IV.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**. Plaintiff may file an Amended Complaint restating his RICO claims within forty days of the date that this order is filed.

IT IS SO ORDERED.

DATED: August 5, 2002

/s/ Gary Feess
Judge Gary Allen Feess
United States District Court

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GENE SERRANO, Plaintiff, v. CITY OF LOS ANGELES, et al., Defendants.	NO. CV 00-13356 GAF (AJWx) **ORDER DISMISSING RICO CLAIMS**

I.

INTRODUCTION

Plaintiff Gene Serrano alleges that several Los Angeles Police Department ("LAPD") officers falsely arrested

him and framed him for a crime he did not commit. His complaint includes claims against the City of Los Angeles, the officers and other defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO").

Serrano's complaint fails to adequately allege a claim for relief under RICO because it does not allege an injury to "business or property" within the meaning of the RICO statute. However, because the Court grants Serrano leave to amend, the RICO claims are **DISMISSED WITHOUT PREJUDICE.**

II.

FACTUAL BACKGROUND

For purposes of ruling on a motion to dismiss, the Court must accept all of plaintiffs factual allegations as true. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

On or about May 16, 1997, several LAPD officers searched Serrano's home and arrested him all without probable cause. (Complaint at ¶7). To support the arrest, the officers falsified their police reports to indicate they found marijuana on Serrano at the time of his arrest. (*Id.* at ¶¶7-8). Serrano pled guilty pursuant to a plea agreement with the District Attorney and was sentenced to an undisclosed amount of time in prison. (*Id.* at ¶8). His conviction was overturned by the state court in June 2000. (*Id.* at 7).

III.

DISCUSSION

A. Legal Standard for Evaluating Motions to Dismiss Under Fed.R.Civ.P. 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Generally, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957). Dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1990).

In evaluating a motion to dismiss, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994); *NL Indus.*, 792 F.2d at 898. The court is not, however, required to accept "legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

RICO claims based on predicate acts involving fraud must be pled with particularity under Rule 9(b). *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1379 (D. Or. 1996) (collecting cases so holding). Where the alleged predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a) applies. *Id.*; *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Even

under this more lenient standard, a RICO claim will be dismissed if the plaintiff fails to set forth factual allegations supporting each element of the alleged violation. *Miranda*, 948 F.2d at 44 ("[T]o avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state *facts* sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.") (emphasis added); *Jennings v. Emry*, 910 F.2d 1434, 1435 (7th Cir. 1990) (same); *cf. Balistreri*, 901 F.2d at 699 (dismissal is appropriate where insufficient facts are pled to support a cognizable legal theory).

Where a motion to dismiss is granted, a district court should grant leave to amend unless it is clear that the complaint cannot be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

B. Elements of a Civil RICO Claim

RICO grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962, in turn, contains four subsections which make it unlawful to: (a) invest income derived from a pattern of racketeering activity in an enterprise; (b) acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (c) conduct the affairs of an enterprise through a pattern of racketeering activity; or (d) conspire to commit any of the above acts. 18 U.S.C. § 1962(a)-(d). Thus, to state a claim for a civil RICO violation, a private plaintiff must allege facts showing (1)

an injury to business or property and (2) a substantive violation of one or more subsections of section 1962.

1. Injury to Business or Property

RICO does not afford a civil remedy for all injuries caused by unlawful racketeering activity; only injuries to "business or property" are actionable. 18 U.S.C. § 1964(c). This limitation excludes recovery for personal injuries. *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 1020, 113 S. Ct. 655 (1992) ("[P]ersonal injuries are not compensable under RICO.")[1]; *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990).[2] In addition, in the Ninth Circuit,

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[1] Although three judges dissented from the judgment in *Oscar*, they too agreed that personal injuries are not compensable under RICO. *See Oscar*, 965 F.2d at 789 (Kleinfeld, J., dissenting).

[2] The Ninth Circuit's position is in accord with every other Circuit Court which has confronted this issue, except, perhaps, the Fifth Circuit. *Compare Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (5th Cir. 1997) (allowing claims based on injury to reputation), *vacated by Teel v. Khurana*, 525 U.S. 979, 119 S. Ct. 442 (1998); with *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 954 (8th Cir. 1999) (Plaintiffs who alleged only injury to reputation lacked standing to sue under RICO because damage to reputation is generally considered personal injury, not an injury to "business or property"); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) ("An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property.' "); *Libertad v. Welch*, 53 F.3d 428, 437 (1st Cir. 1995) (Women who sought services at blockaded abortion clinics lacked standing to assert RICO claims against anti-abortion groups that blockaded those clinics because neither woman suffered any injury to business or property); *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992) ("The terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom."); *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 918-19 (3d Cir. 1991) (RICO plaintiffs may not recover damages for

(Continued on following page)

"injuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar*, 965 F.2d at 785 (plaintiffs failed to allege any pecuniary injury to their interest in rental property caused by alleged acts of racketeering); *Berg*, 915 F.2d at 464 (plaintiffs who had incurred no actual expenses as a result of cancellation of insurance policies lacked standing to sue under RICO); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004, 113 S. Ct. 1644 (1993) (affirming dismissal of RICO claim where it was impossible to determine from the complaint whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits).

The Supreme Court has described RICO's injury requirement as an issue of standing. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275 (1985).

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physical and emotional injuries due to harmful exposure to toxic waste); *Grogan v. Platt*, 835 F.2d 844, 846 (11th Cir.), *cert. denied*, 488 U.S. 981, 109 S. Ct. 531 (1988) (Stating "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom" and holding that RICO does not permit recovery for economic aspects of personal injuries inflicted by predicate act of murder); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (Rejecting argument that injuries to business or property include all pecuniary injuries caused by a substantive RICO violation and upholding dismissal of RICO claim by plaintiffs exposed to toxic chemicals).

The Ninth Circuit's position also finds support in language from two Supreme Court cases. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326 (1979) (Construing similar restriction in Clayton Act and stating "[t]he phrase 'business or property' . . . retains restrictive significance. It would, for example, exclude personal injuries. . . ."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S. Ct. 3292, 3297 (1985) (Marshall, J., dissenting) (RICO "permits recovery only for injury to business or property. It, therefore, excludes recovery for personal injuries.").

Whether a plaintiff has alleged an injury to business or property giving rise to standing under RICO is a question of law for the court to determine and may properly be raised on a motion to dismiss. *See Oscar*, 965 F.2d at 785 (upholding dismissal of complaint for failure to allege an injury to property); *Doe v. Roe*, 958 F.2d 763, 767-68 (7th Cir. 1992).

Plaintiff claims he has pled a cognizable injury to his business or property by alleging he suffered "lost employment, employment opportunities, and the wages and other compensation associated with said employment and opportunities" inasmuch as he "was unable to pursue gainful employment while defending . . . [himself] against [the] unjust charges and/or while unjustly incarcerated." (Complaint at ¶36). Plaintiff further avers that he has suffered "material damage to . . . [his] employment prospects by virtue of the unjust and unconstitutional convictions . . . [he has] sustained." (*Id.* at ¶37). Citing to *Guerrero v. Gates*, 110 F. Supp. 2d 1287 (C.D. Cal. 2000) and the cases cited therein, plaintiff argues that even if he suffered only a personal injury at the hands of the defendants, pecuniary losses stemming from personal injuries are compensable under RICO. *Guerrero* recognized that "[a] number of courts . . . have accepted or shown a disposition in favor of allowing RICO claims for the pecuniary losses associated with personal injuries caused by racketeering" and on that basis allowed a similar RICO claim to proceed. *Id.* at 1292.

This line of reasoning, however, was implicitly rejected by the Ninth Circuit in *Oscar*. The plaintiff in *Oscar* lacked standing to sue not only because she failed to allege any "out-of-pocket expenditures," but also because "[t]he *injury* [she] alleged . . . is like that claimed by the plaintiff

in a personal injury action," *Oscar*, 965 F.2d at 787 (emphasis in original). According to the court, "economic losses which derive[] from a fundamentally personal injury" are not compensable under RICO. *Id.* at 788.

Two cases cited with approval by the Ninth Circuit in *Oscar* confirm this approach. In *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir.), *cert. denied*, 488 U.S. 981, 109 S. Ct. 531 (1988), the Eleventh Circuit held that six FBI agents who were injured in a gun battle with suspects and the estates of two other agents who were killed during the shootout, did not have standing under RICO to sue the estates of the men who shot them. The plaintiffs in *Grogan* maintained that the quantifiable economic consequences of their personal injuries, including lost wages and employment, constituted injuries to business and property within the meaning of RICO, even if they could not recover under RICO for some of the traditional categories of personal injury damages, such as mental anguish. The Eleventh Circuit rejected this argument concluding that "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, *including pecuniary losses therefrom*." *Id.* at 847 (emphasis added).

Grogan is cited with approval by both the majority and dissent in *Oscar*. *See Oscar*, 965 F.2d at 786, 788; *id.* at 791 (Kleinfeld, J., dissenting) ("In *Grogan* . . . the victim . . . was murdered; murder is personal injury, not injury to property, and pecuniary losses flowing from the wrongful death could not transform personal injury into injury to property."). Similarly, in *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992), the Seventh Circuit rejected the idea that any financial loss, no matter what its source, constitutes a business or property injury within the meaning of RICO.

"Most personal injuries . . . entail some pecuniary consequences[,]" but where such losses are incurred as a result of purely personal injuries, they do not constitute injuries to business or property within the meaning of RICO. *Roe*, 958 F.2d at 770.

Oscar adopts the reasoning and results of *Grogan* and *Roe*, both of which directly confronted, and rejected, the argument raised here by plaintiff. All of the injuries alleged by plaintiff flow directly from his false arrest and imprisonment. False arrest and false imprisonment constitute injury to the person, not to business or property. *See Owens v. Okure*, 488 U.S. 235, 251, 109 S. Ct. 573 (1989) (claims under 42 U.S.C. § 1983, including those based on false arrest, are subject to a state's general or residual statute of limitations for personal injuries); *Wilson v. Garcia*, 471 U.S. 261, 277, 105 S. Ct. 1938 (1985) ("Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract."); Cal. Civ. Pro. § 340 (setting forth the statute of limitations for "[a]n action for libel, slander, assault, battery, false imprisonment . . . or for injury to or for the death of one caused by the wrongful act or neglect of another. . . ."); *Black's Law Dictionary* 790 (7th ed. 1999) (defining "personal injury" as, *inter alia*, "[a]ny invasion of a personal right, including mental suffering and false imprisonment."). That plaintiff suffered some secondary financial losses flowing from his personal injuries does not transform his losses into injuries to business or property.

Admittedly, placing recovery for pecuniary losses associated with personal injuries outside the scope of civil RICO claims creates the possibility that victims of predicate acts of

racketeering, such as murder and kidnapping, will be unable to use RICO as a vehicle for redress. But in such cases, plaintiffs will rarely be without a remedy, which undoubtedly played a part in Congress's decision to exclude personal injury litigation from the RICO statute. As noted by the Eleventh Circuit,

> had Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language.

Grogan, 835 F.2d at 847 *quoting Morrison v. Syntex Laboratories*, 101 F.R.D. 743, 744 (D.D.C. 1984) (emphasis in *Grogan*).

Finally, even if the Court were to focus solely on the nature of the damages plaintiff sustained, rather than on the nature of the injury inflicted, plaintiff's losses still would not qualify as compensable injuries. "'[P]roperty' comprehends anything of material value owned or possessed." *Reiter*, 442 U.S. at 338, 99 S. Ct. 2326; *cf.* Cal. Civ. Code § 654 ("In this Code, the thing of which there may be ownership is called property."). Under California law, the loss of employment generally is not considered an injury to property.[3] *Barton v. New United Motor Mfg, Inc.*, 43 Cal.

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[3] Courts evaluating RICO damage claims have generally looked to state law to determine whether a particular claim constitutes an injury to property. *See, e.g., DeMauro v. DeMauro*, 115 F.3d 94, 96 (1st Cir. 1997); *Doe*, 958 F.2d at 768; *Leach v. F.D.I.C.*, 860 F.2d 1266, 1274 n.14 (5th Cir. 1988); *cf. Oscar*, 965 F.2d at 786 (describing the plaintiff's property interest as a "leasehold," a definition supplied by California law).

App. 4th 1200, 1207 (1996) (claim for termination in violation of public policy is in the nature of claim for personal injuries, not claim for violations of property right).[4] Nor can plaintiff's claimed "employment opportunity" losses be characterized as the kind of tangible financial loss to a business recoverable under RICO. *Grogan*, 835 F.2d at 848; *Oscar*, 965 F.2d at 785.

2. Substantive Violation

In addition to demonstrating standing, to state a claim for damages under section 1964(c), a private plaintiff must adequately allege a substantive violation of one of section 1962's four subsections.[5] In this case, plaintiff's complaint includes claims under subsections b, c and d. (Complaint at ¶¶31, 32, 40).[6]

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[4] Examples of compensable injuries include the theft or destruction of personal property. *See Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1349 (3d Cir.), *cert. denied*, 493 U.S. 901, 110 S. Ct. 261 (1989) (destruction of plaintiff's medical equipment constituted injury to property); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 48-49 (S.D.N.Y. 1982) (allegation that defendants stole jewelry from plaintiff's home sufficient to state claim under RICO). Thus, if plaintiff chooses to file an amended complaint he may meet RICO's standing requirement by alleging the theft or destruction of property connected to an act of racketeering.

[5] Although the failure to plead a compensable injury is itself sufficient grounds for dismissal, *see Oscar*, 965 F.2d at 785 n. 1; *Imagineering*, 976 F.2d at 1311, the Court addresses whether plaintiff has adequately pled the other elements of a civil RICO claim based on plaintiff's request for leave to amend his complaint.

[6] The following discussion focuses on plaintiff's attempt to allege a RICO claim against the individual defendants. Plaintiff's RICO claim against the City is dismissed because "government entities are incapable of forming the malicious intent necessary to support a RICO action."

(Continued on following page)

(a) Section 1962(b)

Section 1962(b) makes it unlawful to acquire an interest in or control of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(b)[7]; *Schreiber Distributing Co, v. Serv-Well Furniture Co, Inc.*, 806 F.2d 1393, 1398-99 (9th Cir. 1986).

Allegations that a plaintiff was injured by a predicate act of racketeering are insufficient to state a claim for damages based on a violation of section 1962(b). Rather, a plaintiff must allege he or she was injured by the defendant's acquisition of an interest in an enterprise. *See Advocacy Org. for Patients and Providers v. Auto. Club Ins. Ass'n*, 176 F.3d 315, 329 (6th Cir. 1999) ([A] complaint for violation of § 1962(b) must allege an 'acquisition or maintenance' injury separate and apart from the injury suffered as a result of the predicate acts of racketeering activity."); *Compagnie De Reassurance Dille de France v. New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir.), *cert. denied*, 516 U.S. 1009, 116 S. Ct. 564 (1995) (same); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (same); *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1231 (D.C.Cir. 1991) (same); *cf. Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied*, 508 U.S.

Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996), *cert. denied*, *Wong v. Chun*, 520 U.S. 1268, 117 S. Ct. 2441 (1997).

[7] 18 U.S.C. § 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

908, 113 S. Ct. 2336 (1993) (requiring plaintiff to plead injury due to defendant's investment of income generated by racketeering activity for civil claim based on a violation of section 1962(a)).

This requirement is imposed by section 1964(c) which confers a civil damages remedy only on those individuals who have been injured in their business or property "*by reason of* a violation of section 1962. . . ." 18 U.S.C. § 1964(c) (emphasis added). To allow a plaintiff to recover under section 1962(b) based solely on injuries sustained as a result of racketeering activity, instead of requiring an injury caused by the acquisition or maintenance of an interest in an enterprise, would permit recovery without a showing of a substantive violation. *Cf. Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982), *cert. denied, Prudential Ins. Co. of America, v. Bennett*, 464 U.S. 1008, 104 S. Ct. 527 (1983) (RICO "forbids the predicate acts of racketeering only insofar as an 'enterprise' is involved. . . . RICO is not a recidivist statute with enhanced penalties for acts of racketeering that are elsewhere proscribed in the criminal code.").

In addition, a violation of section 1962(b) requires that the defendant acquire or maintain an interest in an enterprise "through" a pattern of racketeering activity. 18 U.S.C. § 1962(b); *Advocacy Org.*, 176 F.3d at 328 (finding claim alleging a violation of section 1962(b) deficient because complaint was "entirely silent with regard to *how* Defendants acquired or maintained an interest in or control of the enterprise. . . .") (emphasis in original). There must be a causal nexus between the acts of racketeering alleged and the defendants' control over the enterprise.

Plaintiff's complaint fails to adequately allege either of these required elements. None of the allegations in this case suggest plaintiff sustained any injuries as the result of the defendants' acquisition of an interest in an enterprise. Nor does the complaint allege that the defendants gained control over an enterprise through racketeering activity. Indeed, none of the acts of racketeering alleged in the complaint were even directed at an enterprise. At most, plaintiff's complaint alleges he was injured by a single act of racketeering, unrelated to any effort to acquire control over an enterprise. Accordingly, plaintiff has not pled a viable claim for a RICO violation based on section 1962(b).

(b) Section 1962(c)

Section 1962(c) makes it unlawful for any person to participate in the affairs of an enterprise that affects interstate commerce through a pattern of racketeering activity. 18 U.S.C. § 1962(c)[8]; *Sedima*, 473 U.S. at 496, 105 S. Ct. 3275. The terms "enterprise," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961. A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "Racketeering activity"

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[8] 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

includes a variety of state and federal offenses ("predicate acts") including, *inter alia*, murder, kidnapping, gambling, arson, robbery, bribery, dealing in narcotics and extortion. *See* 18 U.S.C. § 1961(1). A "pattern of racketeering activity" requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). In short, to allege a violation of section 1962(c), a plaintiff must allege that a defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly participated in an enterprise, the activities of which affected interstate or foreign commerce.[9]

(i) Racketeering Activity

Section 1961(1) enumerates a list of state and federal crimes that constitute racketeering activity and serve as predicate acts under the statute. RICO lists all of the federal offenses which may constitute predicate acts of racketeering and makes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a

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[9] The requirements of section 1962(c) must be established as to each individual defendant. *See United States v. Persico*, 832 F.2d 705, 714 (2d Cir.1987), *cert. denied*, 486 U.S. 1022, 108 S. Ct. 1995 (1988) ("The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d)."); *Benet-Soto v. Chase Manhattan Bank, N.A.*, 791 F. Supp. 914, 919 (D.P.R. 1992) ("The most basic requirement for sustaining a RICO action is establishing defendants' involvement in the racketeering acts.").

controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year" a predicate act of racketeering. 18 U.S.C. § 1961(1).

Section 1961(1)'s enumerated crimes are exclusive; conduct that does not constitute a listed offense cannot constitute racketeering activity. *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1129 (E.D.N.Y. 1992). Thus, actions which violate an individual's civil or constitutional rights, but do not qualify as any of the criminal offenses listed in section 1961(1), do not constitute racketeering activity. *Bowen v. Oistead*, 125 F.3d 800, 806 (9th Cir. 1997).

To state a claim for damages under section 1964(c) based on a violation of section 1962(c), a plaintiff must properly allege at least one act of racketeering which caused his injury. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 502 U.S. 921, 112 S. Ct. 332 (1991). No matter how many acts of racketeering are alleged, the complaint will fail if it does not allege an injury proximately caused by an act of racketeering. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311 (1992).

Finally, racketeering activity is not adequately alleged simply by repeating the laundry list of predicate acts contained in the statute without including any facts which would suggest such crimes have been committed. Even under the liberal pleading standards of Rule 8, such conclusory allegations are insufficient. *See Jennings*, 910 F.2d at 1436 n. 1 (RICO plaintiffs may not substitute conclusory statements for minimally sufficient factual allegations); *Advocacy Org.*, 176 F.3d at 329 (A plaintiff

may not state a RICO claim by "simply parrot[ing] the language of the RICO statute. . . ."); *Benet-Soto v. Chase Manhattan Bank, N.A.*, 791 F. Supp. 914, 920 (D.P.R. 1992) ("A RICO claim that merely recites the statutory language under the guise of being a factual allegation . . . does not satisfy pleading requirements.").

Plaintiff's complaint charges that defendants engaged in a variety of illegal activities including "attempted murder, extortion, [and] dealing in controlled substances, all chargeable under California law as felonies. . . ." (Complaint at ¶33). Plaintiff further alleges that the police officers "repeatedly committed assaultive and extortionate conduct . . . made false arrests . . . used grossly excessive force, [and] planted evidence. . . ." (*Id.*). Finally, plaintiff claims the "pattern and practice of racketeering activities also included numerous acts of tampering with witnesses, victims, and informants. . . ." (*Id.* at ¶34).

Read in connection with the factual allegations surrounding his arrest and incarceration, plaintiff's complaint adequately alleges an injury caused by an act of racketeering – although not a racketeering act identified by plaintiff. Planting evidence, witness tampering and testifying falsely at a state criminal proceeding do not qualify as predicate acts under RICO. Only the obstruction of proceedings and investigations with a federal nexus qualify as predicate acts. *See* 18 U.S.C. § 1961(1)(B) (making violations of 18 U.S.C. §§ 1503, 1510, 1512 and 1513 predicate acts). Nor are there any facts alleged to support plaintiff's allegations of attempted murder and extortion.[10]

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[10] Plaintiff's reference to dealing in controlled substances is equally unavailing. Section 1961(1) makes violations of state and

(Continued on following page)

Nonetheless, it appears plaintiff's false arrest could be chargeable as kidnapping under California law. Under California Penal Code section 207, "[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another part of the [state] . . . , is guilty of kidnapping." By reference to Penal Code section 834, the statute exempts police officers "taking a person into custody, in a case and *in the manner authorized by law*." (Emphasis added). Because plaintiff alleges that the officers framed him, the allegations describe an unlawful arrest.

Noting that the legislature has criminalized false arrest through other, more specific, penal statutes, *see* Cal. Penal Code §§ 146, 236, defendants argue that the kidnapping statute was not meant to apply to this kind of conduct. But the Court cannot conclude from the fact that the legislature has enacted overlapping statutes that it intended to exempt from prosecution conduct which satisfies all of the elements of section 207. "Statutes may overlap or enjoy a partial redundancy and yet be fully capable of coexisting." *United States v. Kim*, 193 F.3d 567, 573 (2d Cir. 1999) (internal quotations omitted) *citing United States v. Batchelder*, 442 U.S. 114, 118, 122, 99 S. Ct. 2198 (1979).

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federal drug laws predicate acts under RICO. However, a violation of 21 U.S.C. § 841(a)(1), for distributing a controlled substance, requires proof of the "actual, constructive, or attempted transfer of a controlled substance. . . ." *United States v. Wright*, 593 F.2d 105, 107 (9th Cir. 1979). Under the facts alleged, no transfer or attempt to transfer narcotics took place because the officers maintained possession and control of the drugs for the purpose of framing the plaintiff.

Thus, plaintiff has pled sufficient facts to allege he was injured by a predicate act of racketeering activity. Plaintiff has not, however, pled any facts showing defendants engaged in "at least two acts of racketeering activity. . . ." as required by the statute. 18 U.S.C. § 1961(5). If plaintiff chooses to amend his complaint, he must include some facts showing that each defendant committed at least two acts of racketeering.

(ii) Pattern

Allegations that the defendants committed two or more predicate acts of racketeering, standing alone, are insufficient to state a claim for a violation of RICO. Instead, plaintiff must allege some facts suggesting the predicate acts constitute a "pattern" of criminal activity. 18 U.S.C. § 1962.

"[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893 (1989). "Related" conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240, 109 S. Ct. 2893 (internal quotation marks omitted).

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S. Ct. 2893. "Closed-ended" continuity is established by showing that

related predicate acts occurred over a "substantial period of time." *Id.* at 242, 109 S. Ct. at 2893. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.*

Where long-term criminal conduct cannot be established, "open-ended" continuity may be shown. *Id.* Open-ended continuity is the threat that criminal conduct will continue into the future. It is established by showing either that the predicate acts "include a specific threat of repetition extending indefinitely into the future" or that the predicate acts were "part of an ongoing entity's regular way of doing business." *Id.*

Of course at this stage of the proceedings, plaintiff need not prove a "pattern" of racketeering activity. Nonetheless, while a complaint need not include all of the facts necessary to prove a pattern, it must do more than simply allege, in conclusory fashion, that the predicate acts constitute a pattern. *Benet-Soto*, 791 F. Supp. at 921 ("'[C]onclusory statements and [the] repeated use of the statutory phrase" do not adequately plead the pattern requirement). The facts pled must, at a minimum, show some ability on the part of the plaintiff to prove that the predicate acts of racketeering constitute a pattern of criminal activity – an element required by the statute. If a review of the complaint shows no facts from which the Court can infer a pattern of racketeering, then the complaint must be dismissed. *See id.*

Here, plaintiff only pleads facts surrounding one encounter with some of the individual defendants. He then adds "Defendants . . . being associated with said enterprises, conducted and/or participated in said enterprises'

affairs through a pattern of racketeering activities" consisting of "all of the activities set forth in full, factual detail hereinabove. . . ." (*Id.* at ¶¶32, 33). While the more than one hundred complaints on file with this Court alleging abuse at the hands of Rampart Division police officers, similar to that endured by plaintiff, convinces the Court that plaintiff may be able to plead facts which would support the pattern element necessary to a RICO claim, he has not done so here. If he chooses to amend his complaint, plaintiff must allege some facts tending to show that the defendants he has sued engaged in multiple and related predicate acts over a substantial period of time from which the Court can infer a pattern of racketeering activity may ultimately be shown.

(iii) Participating in the Conduct of an Enterprise

Section 1962(c) prohibits a person associated with an enterprise from conducting the affairs of that enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c). Enterprises include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This broad definition includes both legitimate and illegitimate, formal and informal organizations. *United States v. Turkette*, 452 U.S. 576, 587, 101 S. Ct. 2524 (1981). Failure to adequately plead an enterprise is grounds for dismissal. *Chang*, 80 F.3d at 1300.

To establish the existence of a RICO enterprise a plaintiff must adduce "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Turkette*, 452

U.S. at 583, 101 S. Ct. 2524. The evidence must reveal "an ascertainable structure separate and apart from the pattern of racketeering activity. . . ." *Id.* at 1297.

When a plaintiff identifies a legitimate business or organization as the relevant enterprise, the need to allege and prove an existence separate from the racketeering activity can be met without great difficulty. However, when the plaintiff alleges the enterprise was an association-in-fact, showing that the enterprise had an existence separate from the acts of racketeering is more complicated. Addressing what a plaintiff must show to prove that an association-in-fact constitutes an enterprise under RICO, the Ninth Circuit in *Chang* explained:

> The predicate acts of racketeering activity, by themselves, do not satisfy the RICO enterprise element. . . . ¶ At a minimum to be an enterprise an entity must have some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual. The structure should provide some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc basis.

Chang, 80 F.3d at 1299 (internal quotations and citations omitted). For this reason, proof of a conspiracy, without more, does not satisfy this requirement. *Id.*

Public entities, including municipal police departments, can be RICO enterprises. *See, e.g., United States v. Boylan*, 898 F.2d 230, 236 (1st Cir.), *cert. denied*, 498 U.S. 849, 111 S. Ct. 139 (1990); *United States v. Ruiz*, 905 F.2d 499, 503 (1st Cir. 1990); *United States v. Lopez*, 907 F.2d 1096, 1099 (11th Cir. 1990); *United States v. Ambrose*, 740 F.2d 505, 512 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3479 (1985). At least one court has found a

group of rogue police officers to constitute a RICO enterprise. *United States v. Torres Lopez*, 851 F.2d 520, 528 (1st Cir. 1988).

In this case, plaintiff alleges that "[t]he LAPD, its CRASH unit, and its Rampart Division" are all enterprises within the meaning of RICO. (Complaint at ¶27). These are legitimate organizations with ascertainable structures that exist separate and apart from the racketeering activity alleged in the complaint. Thus, plaintiff has identified several potential enterprises. He must, however, also allege that the defendants participated in the conduct of the affairs of the enterprise. The Supreme Court has held that in order to satisfy the conduct requirement of section 1962(c), a plaintiff must allege that the defendant "participated in the operation or management of the enterprise itself" and played "some part in directing the enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 183, 179, 113 S. Ct. 1163 (1993).

In *Reves*, the Supreme Court held that an accounting firm that acted as outside auditor to a farmers' cooperative and improperly valued certain co-op assets on its financial statements could not be held liable under section 1962(c) because it had not directed the affairs of the enterprise. *Id.* at 186, 113 S. Ct. 1163. To reach this conclusion, the Court analyzed the meaning of the words "conduct" and "participate," finding that in this context, "conduct . . . indicates some degree of direction" and "participate" means "to take part in[.]"

> Once we understand the word 'conduct' to require some degree of direction and the word participate to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to 'participate, directly or indirectly, in the conduct of

> such enterprise's affairs' one must have some part in directing those affairs. Of course, the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise . . . but some part in directing the enterprises affairs is required.

Id. at 179, 113 S. Ct. 1163.

Since *Reves*, lower courts have struggled to define the amount of control an individual must exert over an enterprise in order to be liable under section 1962(c). *Compare United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994), *cert. denied*, 513 U.S. 1177, 115 S. Ct. 1161 (1995) (distinguishing between outside professionals and employees of the enterprise) *with University of Maryland v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1538-39 (3d Cir. 1993) ("Under [*Reves*], not even action involving some degree of decisionmaking constitutes participation in the affairs of an enterprise."). Whether patrol officers "participate . . . in the conduct" of the LAPD or their CRASH units as that phrase is used in RICO is an open question after *Reves* and one the Court need not decide at this stage in the proceedings. Plaintiff is being given a chance to amend his complaint, and, if he chooses to do so, his amended pleading must include some facts suggesting either that he can meet the requirements of *Reves*. Alternatively, if plaintiff identifies an association-in-fact as the relevant enterprise he must allege some facts to show the requisite separate structure required under *Chang*.

(c) Section 1962(d)

Section 1962(d) makes it unlawful for any person "to conspire to violate any of the provisions of subsection (a), (b), or (c). . . ." 18 U.S.C. § 1962(d). To recover damages for a violation of section 1962(d), a private plaintiff must demonstrate an injury to business or property proximately caused by an act of racketeering. *Beck v. Prupis*, 529 U.S. 494, 507, 120 S. Ct. 1608 (2000). In addition, a plaintiff must allege the existence of an agreement to violate one or more of RICO's substantive provisions. *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 244 (2d Cir. 1999).

A conspiracy to violate RICO consists of two agreements. "The first is an agreement to conduct or participate in the affairs of an enterprise [or to acquire or maintain any interest in or control of any enterprise] through a pattern of racketeering activity. The second is an agreement to the commission of at least two predicate acts." *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 961 (7th Cir. 1996) (internal citations and quotations omitted); *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir.1993).

Plaintiff's failure to allege a compensable injury to business or property dooms his conspiracy claim just as it does his substantive RICO claims. For this reason, his claim for conspiracy to violate RICO also must be dismissed.

IV.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is **GRANTED** and plaintiff's fourth and fifth

causes of action are **DISMISSED WITHOUT PREJUDICE**. Plaintiff may file an amended complaint within twenty days of the date this order is filed.

IT IS SO ORDERED.

DATED: June 29, 2001

Judge Gary Allen Feess
United States District
Court

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DIAZ, Plaintiff-Appellant, v. DARYL GATES; WILLIE L. WILLIAMS; RICHARD ALARCON; RICHARD ALATORRE; HAL BERNSON; MARVIN BRAUDE; LAURA CHICK; JOHN FERRARO; MICHAEL FEUER; RUTH GALANTER; NATE HOLDEN, et al., Defendants, and, BERNARD C. PARKS, Chief of Los Angeles Police Department, Defendant-Appellee.	No. 02-56818 D.C. No. CV-01-06400-GAF ORDER (Filed Nov. 18, 2004)

Before: SCHROEDER. Chief Judge:

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as

[1] Judges O'Scannlain and Fisher are recused.

precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an

informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery) section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans

to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding

any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by

the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof,

the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943, and amended Pub.L. 98-620, Title IV, § 402(24)(A), Nov. 8, 1984, 98 Stat. 3359; Pub.L. 104-67, Title I, § 107, Dec. 22, 1995, 109 Stat. 758.)

Opposition Brief Unavailable for Filming at this Time

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No. 05-627

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In The
Supreme Court of the United States

BERNARD PARKS,

Petitioner,

v.

DAVID DIAZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

ROCKARD J. DELGADILLO,
City Attorney
JANET G. BOGIGIAN,
Assistant City Attorney
Counsel of Record
600 City Hall East
200 N. Main Street
Los Angeles, California 90012
(213) 978-8335

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION AND SUMMARY

Petitioner Bernard Parks respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered January 9, 2006, and (2) granting the petition. This petition is based upon intervening circumstances of a substantial or controlling effect. (Rule 44.2.)

On January 6, 2006 – the very day this Court considered Parks' petition – the Seventh Circuit for the United States Court of Appeals issued *Evans v. City of Chicago*, a decision that declares it is "at odds with that of the United States Court of Appeals for the Ninth Circuit in *Diaz v. Gates*, 420 F. 3d 897 (9th Cir. 2005)." *Evans*, No. 03-3844, 2006 U.S.App.LEXIS 264 at *37, n. 26 (7th Cir. Jan. 6, 2006).

The Seventh Circuit in *Evans* and the Ninth Circuit in *Diaz* addressed the exact same civil RICO standing issues in near-identical factual scenarios but traveled very different analytical paths before arriving at diametrically opposed conclusions.

In its 7-to-4 en banc opinion, the Ninth Circuit majority permitted David Diaz, a convicted felon, to bring a civil RICO lawsuit against a former police chief on the theory that his arrest, conviction, and 37-year-to-life sentence were unlawful, interfered with his employment opportunities, and thus he suffered injury to business or property for RICO standing purposes. 18 U.S.C. § 1964(c).

Yet in *Evans*, the Seventh Circuit found no RICO standing for Ronnie Evans, also a convicted felon, who asserted the same theory – that his arrest, conviction, and imprisonment were unlawful, interfered with his employment opportunities, and thus injured him in his business or property for standing purposes.

The two circuits' diverse conclusions rest in large part on their very different reads of Supreme Court law interpreting the breadth of civil RICO, underscoring the need for this Court to resolve the dispute on this issue of great significance to public entities in particular.

Additionally, *Diaz's* blind reliance on state *tort* law to define a property interest for RICO standing – without regard to RICO's purpose – set the stage for a non-uniform application of this federal law. As *Evans* now illustrates, such an approach does indeed guarantee that this potent federal law will be used inconsistently from state-to-state.

Given the intervening filing of the *Evans* decision, it is respectfully submitted that this Court should vacate its order denying certiorari and grant the petition.

1. The Seventh Circuit in *Evans v. City of Chicago* leaves no doubt that it completely disagrees with the Ninth Circuit's analytical approach to civil RICO standing in *Diaz v. Gates*

With the filing of *Evans v. City of Chicago* less than one month ago, the Seventh and Ninth Circuits irrefutably have taken polar opposite positions on what constitutes an injury to business or property for purposes of civil RICO standing. And they have done so in a nearly-identical factual scenario of police personnel being sued on the theory the plaintiff was unlawfully arrested, convicted, and incarcerated, thus infringing on his ability to make a living and injuring him in his business or property for purposes of 18 U.S.C. § 1964(c).

The Seventh Circuit found Evans most assuredly did not have RICO standing under this theory. The Ninth Circuit majority in the 7-to-4 en banc decision found Diaz did indeed have standing. But the four dissenting *Diaz* judges issued an opinion that nearly mirrors *Evans* in its analysis and conclusion.[1]

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[1] The discord among Ninth Circuit judges themselves is further illustrated by the *Diaz's* unusual history. In the original three-judge decision, all three judges – none of whom was on the en banc panel – unanimously found Diaz had no RICO standing. *Diaz v. Gates*, 354 F. 3d 1169 (9th Cir. 2004). Seven months later, that opinion was amended with one judge then dissenting. *Diaz v. Gates*, 380 F. 3d 480 (9th Cir. 2004).

As the following chart shows, the similarities in *Diaz's* and *Evans'* facts are as striking as the differences in their analysis and conclusions.

Evans' criminal case	**Diaz's criminal case**
Convicted by guilty plea: Drug possession	**Convicted by jury:** Attempted murder; aggravated mayhem; assault. Enhancements: discharging firearm, infliction great bodily injury.
Post-conviction: "[T]he convictions the State gained against Evans in Cook County Circuit Court are valid and have not been overturned." *Evans*, 2006 U.S.App.LEXIS 264 at *36, n. 24.	**Post-conviction:** Affirmed, *People v. Diaz*, 95 Cal.App.4th (Cal.Ct.App. 2002), reh'g denied (Feb. 22, 2002); Cal. Supreme Ct., review denied (Apr. 17, 2002) U.S. Supreme Ct., cert. denied, 537 U.S. 907 (2002) U.S. Dist. Ct., habeas petition denied. (*See* Diaz, 420 F. 3d at 908, n. 1.)
Sentence: 4 years (served)	**Sentence**: 37-years-to-life

Evans Civil RICO case	**Diaz's Civil RICO case**
Defendants: Chicago Police Dept. officers	Defendants: Former L.A. Police Dept. Chief
RICO standing theory: Wrongly prosecuted, convicted, imprisoned "As a result, [Evans] argues that he was damaged in his 'business or property' by being falsely imprisoned – even though he pled guilty to and was convicted of some of	**RICO standing theory:** Wrongfully arrested, convicted, imprisoned As a result, Diaz alleges he "was rendered unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated."

the charges – because he lost potential income during that time." *Id.* at *21	*Diaz*, 420 F. 3d at 898, quoting the complaint.
7th Circuit's ruling: "The fact that [Evans' lawful conviction/imprisonment] precluded him from seeking employment was merely a derivative of his criminal behavior and does not constitute the deprivation of a property right." *Id.* at *36, fn. omitted. "[W]e reaffirm our holding in *Doe v. Roe*, and in doing so reiterate this court's understanding that personal injuries, and the pecuniary losses flowing from those injuries, are insufficient to establish standing under civil RICO, § 1964(c). We also hold the foregone earnings stemming from lost opportunity to seek or gain employment are, as a matter of law, insufficient to satisfy § 1964(c)'s injury to 'business or property' requirement where they constitute nothing more than pecuniary losses flowing from what is, at base a personal injury." *Id.* at *37, fn. omitted.	**9th Circuit's majority ruling:** "We believe the best reasoned approach is that of *Doe v. Roe*, 958 F. 2d 763 (7th Cir. 1992) under which we typically look to state law to determine 'whether a particular interest amounts to property'". *Id.* at 899. Looking to state tort law, the court finds, "[t]he harms he alleges amount to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law." *Id.* at 900.

How the 7th Cir. would resolve Diaz:	**Diaz dissent:**
"Diaz's loss of employment and the related monetary losses he suffered merely represent pecuniary losses derivative of a [sic] underlying, non-compensable personal injury, and as such those losses cannot constitute an independent grounds for RICO standing." 2006 U.S.App.LEXIS 264 at *37, n. 26, citing *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979) and *Roe*, 958 F. 2d at 770.	Following the "logic" of *Doe*, 958 F. 2d at 770, Judge Gould states, "[I] would today hold that an allegation of lost employment that flows from a personal injury is not a separate injury to business or property, but rather is a derivative part and parcel of the underlying non-compensable personal injury." 420 F. 3d at 914 (Gould, J., dissenting), citing *Grogan v. Platt*, 835 F. 2d 844, 848 (11th Cir. 1988).

Even before the Seventh Circuit in *Evans* openly declared its conflict with the Ninth Circuit, the *Diaz* majority knew its opinion could be seen as conflicting with the Seventh Circuit's *Doe v. Roe* opinion and the Eleventh Circuit's *Grogan v. Platt*, 835 F. 2d 844 (11th Cir. 1988). Sensitive to the conflict, the *Diaz* majority not only denied it but took the offense, claiming *Doe* actually provided the guiding light for its analysis. *Diaz*, 420 F. 3d at 899.[2]

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[2] Judge Kleinfeld, concurring in *Diaz*, did not downplay the split. Instead, he openly criticized the Seventh Circuit's *Doe v. Roe* – and the Eleventh Circuit's *Grogan v. Platt* – stating both cases "strain RICO's statutory language." *Diaz*, 420 F. 3d at 903 (Kleinfeld, J., concurring).

The *Diaz* dissent chastised the majority for ignoring the obvious circuit split:

> "[A]lthough the majority fails to recognize it, in *Doe* the Seventh Circuit addressed the same situation we face here – an allegation of lost employment wages stemming from a non-compensable personal injury. Diaz allegedly missed work because he was falsely incarcerated, while Doe allegedly missed work due to the continuous threats and harassment of her former divorce attorney. Both plaintiffs alleged injury to business or property wholly derived from personal injuries (false imprisonment and emotional distress, respectively). *This inescapable*

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But with the issuance of *Evans*, the conflict is undeniable:

> "We are cognizant of the fact that our decision today is at odds with that of the United States Court of Appeals for the Ninth Circuit in *Diaz v. Gates*, 420 F. 3d 897 (9th Cir. 2005) (en banc). The *Diaz* majority, however, blurs the distinction between whether an alleged injury satisfies the statutory definition of 'business or property' and whether a 'business or property' injury was proximately caused by the predicate acts." 2006 U.S.App.LEXIS at *38, n. 26.

After describing *Diaz's* approach, *Evans* comments, "This analysis is equal parts mischaracterization of the RICO statute and red herring." *Ibid. Evans* explains exactly how it would have found David Diaz lacked standing:

> "Diaz's loss of employment and the related monetary losses he suffered merely represent pecuniary losses derivative of a underlying, non-compensable personal injury, and as such those losses cannot constitute an independent grounds for RICO standing." *Evans*, 2006 U.S.App.LEXIS 264 at *38, n. 26.

It is hard to imagine a clearer divide between the circuits on this issue which is of extreme importance especially to public entity employees facing the prospect of civil RICO claims being appended to every civil rights action or – as in David Diaz's case – of RICO claims being substituted for a civil rights claim because RICO has a longer statute of limitations.

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truth belies the majority's purported reliance on Doe for its extension of Mendoza; the majority is actually in conflict with Doe, just as it is in conflict with Grogan." Diaz, 420 F. 3d at 913. (Gould, J, dissenting) (footnote omitted, emphasis added).

2. *Evans* and *Diaz* have conflicting interpretations of Congress' intent regarding the breadth of civil RICO and Supreme Court law defining RICO's breadth

The Seventh and Ninth Circuits' disparate conclusions on RICO standing largely stem from their different reads of Congress' intent as to the breadth of civil RICO and of the Supreme Court law interpreting RICO's breadth.

Evans interprets Congress' intent this way:

> "The real question is whether Congress intended RICO laws to compensate plaintiffs for pecuniary losses, such as loss of income, stemming from what is essentially a personal injury like inability to work or seek employment. *We are of the opinion that Congress did not intend to do so.* [internal citation.] This is particularly true given the 'restrictive significance' of the RICO standing requirement, which was adopted directly from the Clayton Act." *Evans*, 2006 U.S.App.LEXIS 264 at **29-30 (emphasis added), citing *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979).

Evans explains that *Reiter* is a case in which

> "the Supreme Court directly addressed this question of whether the Clayton Act's standing provision, which like civil RICO requires injury to 'business or property,' encompassed personal injuries. *See Reiter*, 442 U.S. at 339. The court stated that although actual monetary losses would, under most circumstances, be sufficient to confer standing under the Clayton Act, 'Congress must have intended to exclude some class of injuries by the phrase "business or property," and the Act 'would, for example, exclude personal injuries suffered.'"
>
> *Evans*, 2006 U.S.App.LEXIS 264 at **23-24, citing *Reiter*, 442 U.S. at 339.

Evans also recognizes that the Supreme Court has said "RICO is to be read broadly," citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 497-498 (1985), but notes that nonetheless,

> "[i]t would be contrary to the intent of Congress for this court to construe the statute *so broadly* that we completely read the 'restrictive significance,' *see Reiter*, 442 U.S. at 339, of the 'business and property' standing requirement out of 18 U.S.C. § 1964(c)." (emphasis in original.) *Evans*, 2006 U.S.App.LEXIS 264 at *33.

By contrast, the *Diaz* majority makes no mention of *Reiter* but reads *Sedima* as interpreting RICO so broadly that it found Diaz easily cleared the standing hurdle by alleging that his arrest and felony conviction – with its attendant 37-year-to-life sentence affirmed by California's appellate court – caused him to be "'unable to pursue gainful employment while defending himself against unjust charges and while unjustly incarcerated.' Compl. p. 31." *Diaz*, 420 F. 3d at 898.

Judge Stephen Reinhardt, concurring in *Diaz*, stated his personal disagreement with such an expansive read of RICO but felt "given the construction that RICO has been afforded by the Supreme Court, we are no longer free to read it as an anti-racketeering statute." Citing *Sedima*, he adds, "[a]lthough I disagree with this construction, we must follow the law as it is determined by the Supreme Court . . . ." *Diaz*, 420 F. 3d 903 (Reinhardt, J., concurring).

Review is urgently needed to resolve this fundamental disagreement between the two circuits as to how the Supreme Court reads civil RICO's standing requirement.

3. As *Evans* so pointedly illustrates, uniform application of the federal RICO law will be impossible under *Diaz's* approach of blindly relying on state *tort* law to define property interests

The second question Parks presented in his original petition for certiorari was to what extent, if any, federal courts should rely on state *tort* law to define a business or

property interest for purposes of RICO standing. To allow state tort law to be a dominant and isolated factor in defining such interests, Parks argued, would ensure inconsistent application of this federal law and allow applications of RICO that far exceed those intended by Congress. Petition for Certiorari, pp. 23-25.

Indeed, as *Evans* correctly instructs, the court "need not adopt a state law definition of 'business or property' which is so broad that it contravenes Congress' intent in enacting the RICO law," citing *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 208 (1946) for the proposition "that federal courts are justified disregarding state law if the Congressional purposes underlying federal law would be undermined." *Evans*, 2006 U.S.App.LEXIS 264 at *37.

But, as *Evans* so pointedly illustrates, the Ninth Circuit has solidly undermined RICO's purpose and the state of the law is now such that inconsistent application of RICO is a certainty.

The Ninth Circuit, *Evans* explains, "seems to weigh significantly on that court's understanding of what constitutes a 'property interest' pursuant to California law." *Evans*, 2006 U.S.App.LEXIS 264 at *38, n. 26. *Diaz* found such protected property interests to include "legal entitlement to current and prospective contractual relations." *Diaz*, 420 F. 3d at 900. But, *Evans* notes, "[I]llinois law does no such thing." *Id.* at *38, n. 26.

Thus, Illinois residents who seek civil RICO relief on a theory of interference with employment prospects have no standing in federal court because "[t]he Illinois Supreme Court has specifically held that a person has a property interest in employment only where that person has a legitimate expectation of continued employment." *Evans*, 2006 U.S.App.LEXIS 264 at *38, n. 26. Yet, Californians who make the exact same claim have sound footing in federal court under *Diaz's* theory that "California law protects the legal entitlement to both current and prospective contractual relations." *Diaz*, 420 F. 3d at 900.

Moreover, the *Diaz* majority paid no heed to the fact that the only reason David Diaz may have suffered harm to his "prospective" business relations was because he was serving a 37-year-to-life sentence that has withstood substantial appellate review. (420 F. 3d at 908, n. 1 (Gould, J., dissenting).)

But the Seventh Circuit found Ronnie Evans' status as convicted criminal to be of great significance:

> "The fact that this [Evans' arrest, conviction and incarceration] precluded him from seeking employment was merely a derivative of his criminal behavior, and does not constitute the deprivation of a property right. Therefore, looking to state law to define 'property' in this context does not help Evans' claim, for he is still unable to establish that he was injured in his 'business or property' based on the fact that he was denied the opportunity to seek work while incarcerated." *Evans*, 2006 U.S.App.LEXIS 264 at *36, fn. omitted.

In short, the Ninth Circuit has built an analytical framework that permits an application of federal law that not only undermines RICO's purpose but ensures an inconsistent use of this federal law from state-to-state.

CONCLUSION

With the filing of *Evans* decision last month, there is an undeniable split between the circuits on this important issue of civil RICO standing, particularly as it applies to public entities. Petitioner Parks urges the court to vacate the denial of the petition for writ of certiorari and to enter a new order granting the petition.

DATED: February 2, 2006

Respectfully submitted,

ROCKARD J. DELGADILLO,
City Attorney
JANET G. BOGIGIAN
Assistant City Attorney
Counsel of Record

CERTIFICATE OF COUNSEL

As counsel for petitioner Bernard Parks, I hereby certify that this petition for rehearing is presented in good faith, is not for delay, and is restricted to the grounds specified in Rule 44.2.

JANET G. BOGIGIAN
Assistant City Attorney
Counsel for Petitioner,
Bernard Parks

Opposition Brief Unavailable for Filming at this Time